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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~1119~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

JOHN T. CHADWELL
VICTOR P. KAYSER
C. LEE COOK, JR.
JOSEPH V. GIFFIN
ROBERT F. WARD
135 South La Salle Street
Chicago, Illinois

LAURENCE B. DODDS
160 Middle Neck Road
Great Neck, New York

Attorneys for Hazeltine Research, Inc., Respondent

Of Counsel:

CHADWELL, KECK, KAYSER & RUGGLES
135 South La Salle Street
Chicago, Illinois 60603
RAndolph 6-2545

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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IN THE

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vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

QUESTIONS PRESENTED

Zenith's statement of questions presented repeatedly suggests that this Court in its decision and the Court of Appeals in its most recent decision reached factual or legal conclusions which were not reached. Based upon the actual rulings of the Court of Appeals, the questions presented are:

1. Whether the Court of Appeals was correct in holding that the affirmative defenses of release and statute of limitations are in the case?

2. Whether the Court of Appeals was correct in holding that the September 27, 1957 general releases executed by

Zenith bar the recovery of damages sustained by Zenith after the releases, caused by illegal conduct occurring prior to the releases?

3. Whether the Court of Appeals was correct in holding that the statute of limitations (15 U.S.C. § 15(b)) bars the recovery by Zenith of damages caused by illegal conduct occurring prior to the damage period?

4. Whether the Court of Appeals properly gave effect to the legal bars of the releases and statute of limitations by ordering a remand to the trial court for further hearings on the amount of recoverable damages as to Canada, since a substantial but undetermined part of the original damage award necessarily resulted from pre-release and pre-damage period conduct?

In light of Zenith's arguments the following subordinate questions are presented:

a. Does *Bigelow* v. *RKO Radio Pictures* require that the statute of limitations and the law of settlement and release not be applied against Zenith?

b. Does public policy require that Zenith be awarded damages barred from recovery by release and limitations?

STATEMENT OF THE CASE

Zenith's Statement of the Case (Z. Br. 6-13)[1] makes no reference to important aspects of the litigation and fails to

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[1] The following abbreviations are used in this brief:

Z. Br. ..... Brief for Petitioner Zenith Radio Corporation.
PX ..... Plaintiff's Exhibit.
DX ..... Defendant's Exhibit.
A. ..... Citations to the printed Appendix in No. 49, October Term, 1968.
AA. ..... Citations to the additional printed Appendix herein.

represent accurately the decision of this Court and the decisions of the courts below. For example, Zenith attempts to create the impression, both in its Statement and elsewhere in its brief, that this Court passed upon and approved the trial court's finding as to the *amount* of damage, when in truth this Court held only that there was sufficient evidence to sustain the trial court's inference as to the *fact* of damage as to Canada, leaving the undecided issues of release, limitations and amount of damage for the Court of Appeals.

To the extent necessary for an understanding of the issues presently before the Court, we will describe briefly what occurred and what was decided in the prior decisions, both in this Court and in the lower courts.

I. THE TRIAL COURT DECISION (A. 2859; 239 F. SUPP. 51).

On November 20, 1959, Hazeltine Research, Inc. (HRI) filed suit in the Northern District of Illinois against Zenith for infringement of a single U.S. patent relating to television apparatus (A. 11-13). On April 7, 1960, Zenith filed its answer alleging invalidity and non-infringement and further alleging that the patent was unenforceable by reason of patent misuse and unclean hands (A. 14-19). No counterclaim was included with Zenith's answer.

On May 22, 1963, over three years later, Zenith filed its counterclaim against HRI for damages charging violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) (A. 64-69). In support of its motion for leave to file the counterclaim at such a late date, Zenith filed the sworn statement of Francis Crotty, a Zenith vice president and a counsel of record, that the matters "which are the proximate cause of damages alleged and require the relief sought in said counterclaim, *occurred after the filing of the answer*

herein," i.e., after April 7, 1960 (A. 63).[2] The same representation was made by Zenith in its motion for leave to file the counterclaim (A. 62).

In January, 1965 the trial court adopted and entered verbatim the findings of fact and conclusions of law proposed by Zenith. These findings stated that the foreign patents of Hazeltine Corporation, HRI's parent, were licensed to patent pools in England, Australia and Canada and that these pools over a period of many years had refused to license Zenith's imported radio and television sets and had brought or threatened suit against distributors and dealers who handled Zenith's imported radio and television sets in the three countries involved. The trial court held that these patent pools constituted conspiracies in restraint of trade and that HRI was a co-conspirator and thereby liable for the acts of the patent pools (Findings XV through XXXV, A. 2899-2907).[3]

Zenith's damage calculation was based on what was later referred to in the proceedings as the "mature market" or "established market" theory (*e.g.*, A. 3033, 3204). Zenith asserted that it was entitled to recover damages on the basis of sales and profits it supposedly could have realized during the four-year damage period (minus actual sales

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[2] Throughout this brief where emphasis appears in quotations it has been supplied by us unless otherwise indicated.

[3] Contrary to Zenith's assertion (Z. Br. 6) the trial court did *not* hold that the instant patent infringement suit was pursuant to a conspiracy to bar Zenith from the Canadian market. There was no such finding. The statements of the trial court made after the findings were entered (A. 3031-32), of Zenith's counsel (A. 428; Zenith Post Trial Brief in trial court, pp. 39-40), and the findings that were entered (Finding XIII, A. 2898-99) all confirm that the domestic negotiations and infringement suit had nothing to do with the Canadian pool.

and profits), had the pools' pre-damage period conduct not prevented Zenith from entering the damage period with a "mature" or "established" market, and had the pools not prevented a further increase in market share during the damage period (A. 3203-3204; see also A. 457, 461, 465; DX 220, A. 2661). Wright, Zenith's president, and Kaplan, its executive vice president, testified that but for the long-standing interference by these patent pools in the various countries, Zenith, during the four-year period involved here (May 22, 1959-May 22, 1963), would have had a share of the Canadian market equal to the share it had built up in the United States, a percentage share of the English market equal to one-fourth its U.S. percentage, and a percentage share of the Australian market equal to one-tenth its U.S. percentage (A. 457, 461, 465, 528-29).

Following adoption of Zenith's proposed findings by the trial court, *but prior to entry of judgment,* HRI's new counsel filed a Motion for Withdrawal of Antitrust Findings and Conclusions and for Other Relief (A. 2939-51) and made an offer of proof (A. 2957-95). The motion stated several grounds for the relief requested, including the affirmative defenses of release and statute of limitations, the governmental embargoes in England and Australia, and also equitable considerations. During proceedings following this motion, the trial court granted leave to HRI to file the defenses of release and statute of limitations (A. 3037), but HRI's motion to dismiss on these grounds (A. 3048) was then denied (A. 3062) and judgment for $18,892,173 as to Canada was entered (A. 3078-80). However, the trial court granted a limited reopening of the proofs with respect to England and Australia, and at hearings in October 1965, HRI proved and the trial court held that governmental embargoes in those countries, and *not* the patent pools, had

barred Zenith's entry into those markets prior to the start of the damage period (A. 3202-06).

Following proof of the embargoes, the trial court required that Wright and Kaplan be recalled to testify further concerning the basis on which they had made their market share estimates with respect to England and Australia (A. 3204), which the trial court characterized as a "guesstimate" (A. 3526). In their testimony on recall they confirmed that Zenith's claim as to Canada had indeed been based on the established market theory; but as to England and Australia they asserted for the first time that the damage calculation had been based upon starting the damage period with a zero share of the market (A. 3437-40, 3490-91). Although the trial court in the light of this changed theory found their estimates as to England and Australia to be exaggerated (A. 3525-26), it nevertheless entered judgment in favor of Zenith with respect to England and Australia, merely reducing the amount of the treble damage award for these two countries from $30 million (A. 2908) to about $16 million after trebling (A. 3539).

II. THE COURT OF APPEALS' DECISION OF DECEMBER 19, 1967 (A. 4238; 388 F.2d 25).

On appeal, HRI urged several grounds for reversal, including (1) failure to prove the fact of damage in all three countries, (2) the bar of the statute of limitations (15 U.S.C. § 15(b)), (3) the 1957 releases given in settlement of prior RCA-Zenith litigation (see pp. 22-24, *infra*), and (4) that the damages awarded were excessive. The Court of Appeals reversed the trial court's treble damage judgment as to Canada (as well as the other two countries) *solely* on the basis of Zenith's failure to prove the "fact of damage,"

stating that:

> "We agree with HRI that Zenith failed to sustain the burden of proving the essential *fact* of damage in the relevant period. *We need pass on no other contention, therefore,* in reversing the judgment on the counterclaim" (A. 4254).

III. THIS COURT'S DECISION OF MAY 19, 1969 (AA. 4; 395 U.S. 100).

The Court, in reversing the Court of Appeals as to Canada,[4] did so solely on the "fact of damage" issue, carefully noting that there were several "major points" raised by HRI in the Court of Appeals, and that the Court of Appeals had not yet passed upon them (AA. 13; 395 U.S. at 113). This Court said:

> "We have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the *fact of damage* in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured *to some extent* by the Canadian pool's restraints upon imports of radio and television sets" (AA. 14; 395 U.S. at 114).[5]

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[4] The Court agreed with the Court of Appeals in setting aside the remaining amount of the judgments as to England and Australia on the ground that no "fact of damage" had been proved (AA. 14; 395 U.S. at 114). The Court also agreed that the judgments against Hazeltine Corporation were properly vacated by the Court of Appeals (AA. 10; 395 U.S. at 110).

[5] Zenith asserts that "this Court has already held that there is *conclusive proof* in the record of the 'fact of damage'" (Z. Br. 26; see also Z. Br. 21). However, as shown by the above quotation, the exact holding of this Court was that Zenith's evidence on the fact of damage as to Canada was "*by no means conclusive*", but was sufficient to sustain the inference of the fact of damage in that market.

Thus, this Court held that the evidence was sufficient to sustain an inference that Zenith had in fact been injured *"to some extent,"* but left open and did not decide the question of the extent of Zenith's injury.

Contrary to Zenith's representations, this Court did not decide the other issues on the Canadian damage claim raised by HRI in the Court of Appeals. In fact, to the extent that these other issues were referred to, the Court explicitly refrained from deciding them:

(a) The Court referred to the question whether the trial court's failure to give effect to the defenses of release and limitations was a ruling on the merits or was on the ground of waiver, but pointed out that "[t]he parties have not argued the matter" and stated it would not pass on this issue (AA. 17 n. 13; 395 U.S. at 117 n. 13) (see pp. 49-57, *infra*).

(b) The Court referred to the relevance of the 1957 releases to the Canadian damage claim, stating that the "release appears to be relevant only to Zenith's claim for injury to its Canadian trade" (AA. 13 n. 7; 395 U.S. at 113 n. 7), but did not rule as to the effect to be given to the releases (see pp. 22-33, *infra*).

(c) The Court referred to the question whether the statute of limitations barred recovery of damages resulting from pre-damage period conduct, but pointed out that the matter had not been argued and stated it would *not* "deal with the question of whether damage period injury from pre-damage period conduct is recoverable . . ." (AA. 17 n. 13; 395 U.S. at 117 n. 13) (see pp. 33-42, *infra*).

(d) While not passing on their merits, the Court also recognized the potential effect of these defenses on the amount of recoverable damages. The Court pointed out that the amount of damages as to Canada had been deter-

mined on the assumption that, absent the activities of the Canadian pool, Zenith *"would have had 16%* of the Canadian television market on May 22, 1959 [the first day of the damage period], and throughout the damage period *rather than its actual 3% share"* (AA. 16; 395 U.S. at 116). The Court then said:

> "Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, *those operations must have occurred prior to May 22, 1959.* Some part of the damages awarded, therefore, *necessarily resulted from pre-damage period conduct"* (AA. 16; 395 U.S. at 116-17).[6]

Thus, the affirmative defenses, if held to apply, necessarily barred recovery by Zenith of some part of the $18,892,173 award of the trial court.

Having reversed the Court of Appeals' ruling solely on the fact of damage issue, this Court's remand "for further proceedings consistent with this opinion" (AA. 40; 395 U.S. at 141), left the remaining undecided issues for decision by the Court of Appeals (pp. 57-62, *infra*).

IV. THE COURT OF APPEALS' DECISION OF OCTOBER 27, 1969 ON REMAND (AA. 54; 418 F.2d 21).

On remand, the Court of Appeals did not disturb or question this Court's holding that the fact of damage as to Canada had been proved. It considered only the questions which it had originally left undecided with respect to Canada, acknowledging that this Court had "concluded we erred in our determination that Zenith had failed to prove the 'fact' of damage in Canada" (AA. 55). The Court of Appeals concluded that the issues remaining before it on

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[6] Similarly, Zenith asserted that its share of the Canadian radio market at the start of the period should have been about 13% rather than its actual share of about 4% (DX 220, A. 2661).

remand were the following:

> "(1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith*" (AA. 55).

The Court of Appeals then held that:

(a) the defenses of release and limitations had not been waived, and the trial court had considered and (erroneously) rejected them on their merits (AA. 56);

(b) HRI as an alleged joint tortfeasor was entitled to the benefit of the September 27, 1957 releases given by Zenith as part of the settlement of the RCA-Zenith litigation (pp. 22-24, *infra*) and these releases barred recovery for "past, present and *future damages* [emphasis by the Court of Appeals] flowing from any misconduct of HRI prior to the dates of the releases" (AA. 57);

(c) the limitations defense was a bar to Zenith's recovery for damages resulting from conduct which occurred prior to the start of the damage period (*i.e.*, prior to May 22, 1959), so that Zenith's recovery was limited to damages resulting from conduct "occurring in the damage period" (AA. 58);[7]

(d) neither the release nor the statute of limitations defense was a complete bar to Zenith's Canadian damage

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[7] Contrary to Zenith's assertions, the question whether or not the statute of limitations is tolled as against a party in a civil action who was not a defendant in government litigation was not before the court (see pp. 42-49, *infra*).

claim because some damage-causing pool conduct had occurred within the limitations period (AA. 58-59); and

(e) the measure of damages is "the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor" (AA. 59), *i.e.*, the damages which are attributable to the conduct of the patent pool during the damage period.

The Court of Appeals noted that this Court had pointed out that the original award was based on the assumption that but for the pool's pre-damage period conduct, Zenith would have started the four-year period with 16% of the market instead of the 3% it actually had (AA. 57), and that some part of the damages awarded *"necessarily resulted from pre-damage period conduct"* (AA. 60). Since there were no findings or evidence which would permit the assessment of damages on the proper basis (*i.e.*, the profits Zenith would have achieved in the damage period but for the operations of the Canadian pool *in the damage period*), additional proceedings in the trial court were necessary. Accordingly, the Court of Appeals ordered a remand to the trial court for further hearings to give HRI the opportunity to offer evidence "aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391" (AA. 61).[8]

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[8] Contrary to Zenith's assertion (Z. Br. 29) the Court of Appeals did not hold that on remand Zenith's recovery was limited to any damages resulting from the June 5, 1959 letter from the pool to Zenith, but pointed to the letter as an example of conduct taking place during the period which could form the basis for a damage award (see p. 67, *infra*).

SUMMARY OF ARGUMENT

I. The Court of Appeals Was Correct In Holding that the Damage Award Should Exclude Damages Resulting from Conduct of the Canadian Pool Which Occurred Prior to the Releases or Prior to the Limitations Period.

The importance of the release and limitations defenses.

The amount of damages originally awarded by the trial court was calculated on the assumption that but for the interference of the Canadian pool going back over many years prior to the start of the damage period (May 22, 1959-May 22, 1963), Zenith would have been doing business and building up a market in Canada and would have *entered* the damage period with a "mature" or "established" market from which it would have realized sales and profits during the damage period. Zenith's witnesses estimated that this market would have been equal in percentage share to the market developed by Zenith in the United States where it had been marketing radios since the 1920's, and television sets since 1948.

As this Court pointed out in its opinion, "some part" of the original damage award "necessarily resulted from pre-damage period conduct" because damages were awarded on the assumption that Zenith "would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share." Since Zenith claimed that its beginning market share as to television was less than one-fifth of what it would have been but for the pool's conduct, a substantial part of the claimed damages necessarily resulted solely from pre-damage period conduct.

The effect of the releases.

Zenith released any claim for damages caused by conduct of the Canadian pool taking place prior to September 27,

1957. In settlement of prior litigation against RCA, GE and Western Electric involving the same charges with respect to the Canadian patent pool as are made in this case, Zenith executed general releases on September 27, 1957, releasing not only the damages which had been sustained prior to the date of the releases, but also by their express terms releasing any *future damages caused by acts prior* to the releases. Thus the releases bar that part of the original damage award against HRI for lack of market share and loss of profits which is attributable to the Canadian pool's interference during the many years prior to September 27, 1957, with Zenith's ability to build up its Canadian market share.

Zenith has asserted that HRI was a co-conspirator with the parties to whom the releases were given in the settlement of the *RCA-Zenith* case. Since the releases do not reserve rights against third parties, HRI as an alleged co-conspirator is entitled to the benefit of the releases and Zenith has so admitted earlier in this litigation.

The cases cited by Zenith which hold that it is contrary to public policy to release liability for "future violations" of the antitrust laws, have no application because the releases involved here do not release damages from future violations, only future damages from past conduct.

The effect of the statute of limitations.

The statute of limitations (15 U.S.C.§15(b)) bars recovery of that part of the amount of damages originally awarded to Zenith which resulted solely from pre-damage period conduct. The statute bars any action not brought within four years after the date that the cause of action accrued. A cause of action for treble damages accrues when the damage-causing conduct takes place, and the wronged party can then sue to recover all damages, including future damages, resulting from that illegal conduct.

Contrary to Zenith's contention, a new cause of action does not arise each day or each time additional damages accumulate by reason of previous conduct. When the illegal damage-causing conduct takes place, the claimant may sue then not only for the damages which it has suffered, but also those it will suffer in the future by reason of that damage-causing conduct. Thus, prior to May 22, 1959, Zenith could have sued (subject to the bar of the releases) not only for the profits it had by then actually lost as a result of pool interference during the preceding four years, but also for the profits it would lose in the future by reason of that interference with Zenith's market build-up.

The trial court's original award included damages which "necessarily" were attributable solely to the fact that the Canadian pool by its conduct beginning over 30 years prior to May 22, 1959, had allegedly prevented Zenith from building up a mature market position in Canada by May 22, 1959. The recovery of these damages is barred by the statute of limitations.

Tolling is not before the Court.

Zenith's claim that the statute of limitations was tolled back to November, 1954 by reason of government litigation to which HRI was not a party is not before this Court because it was neither pleaded nor raised in the trial court and was not ruled upon by the Court of Appeals. Moreover, Zenith would be prevented from asserting tolling because it obtained leave to file its counterclaim upon the sworn representation that the damages it sought by the counterclaim were caused by alleged illegal conduct taking place *after the filing of the answer* (on April 7, 1960). For Zenith to have asserted that tolling entitled it to rely upon conduct going back to November, 1954 as a basis for recov-

ery of damages would have been in direct conflict with its sworn representations. In any event, there would not be tolling here because tolling does not apply to a defendant in private litigation who was not a defendant in the government litigation.

The defenses are in the case.

Although the defenses of release and limitations were not contained in HRI's reply to Zenith's counterclaim, they were pleaded by HRI with leave of court prior to entry of judgment as to Canada. Contrary to Zenith's contention, the trial court did not hold that these defenses were irrevocably waived but instead permitted the pleading of the defenses over Zenith's objection that they were "too late," and then erroneously concluded that they could not bar any part of Zenith's recovery. The trial court clearly had the power to permit the pleading of these defenses at any time prior to entry of judgment, and by granting HRI's motion the court relieved whatever waiver may otherwise have been created by the failure to plead these defenses earlier.

II. The Court of Appeals Had Authority to Rule on the Defenses and to Remand to the Trial Court for Further Hearings.

This Court held that the Court of Appeals had erred in holding that Zenith had not proved the fact of damage as to Canada. In so holding, the Court noted that the Court of Appeals had decided only that issue and had not passed upon such other issues as release, limitations, and the *amount* of recoverable damages. The remand to the Court of Appeals was "for further proceedings consistent with this opinion" and the Court of Appeals therefore had the power and duty to consider the remaining undecided issues.

Nothing the Court of Appeals did on remand is in any way inconsistent with the decision of this Court. Having concluded on remand that the affirmative defenses barred the recovery of that part of the original damage award which was based upon conduct of the Canadian pool before the releases and before the limitations period, the Court of Appeals properly remanded the case for further proceedings to give effect to those defenses. It is essential to have such further proceedings because *there are no trial court findings* as to the amount of damages flowing from damage period conduct, and there is no evidence in the record on which such findings could be made.

The proceedings ordered by the Court of Appeals do not require "a complete new trial" but even if they were to be so construed they would clearly be within the authority of the Court of Appeals. The decision of the Court of Appeals to remand for further proceedings in the trial court was not because the trial court had committed an abuse of discretion but rather because the trial court had committed errors of law in failing to apply properly the defenses of release and limitations to the amount of Zenith's recoverable damages.

III. Zenith's Argument that the Decision of the Court Below Is Contrary to Bigelow v. RKO Radio Pictures Is Without Any Basis.

The Court of Appeals' opinion in no way questioned the use of reasonable estimates as to amount of damage, or increased the standards of proof required under the *Bigelow* case. In fact the Court of Appeals expressly recognized the appropriateness of the use of reasonable estimates, but pointed out, as this Court had done, that the damage estimates given by Zenith's witnesses as well as the findings and original award by the trial court as to the amount of

damages, were based upon the assumption that Zenith was entitled to recover damages caused by pre-release and pre-damage period conduct. To accept Zenith's argument would require a holding that *Bigelow* somehow nullifies the statute of limitations and the law of settlement and release.

The opinion of the Court of Appeals clearly enables Zenith to recover the difference between the profits it actually made and those it would have made if, during the damage period, it had been a free competitor. All that this decision would require is a determination of the market share and profits which Zenith would have had in the period from May 22, 1959 to May 22, 1963, assuming Zenith entered that period with its actual Canadian market share and assuming that the pool was out of existence during the damage period.

IV. There Is No Merit in Zenith's Insinuations of Prejudice or Its Assertions that the "Public Interest" Requires that the Entire Original Award of $18,892,173 Be Reinstated.

Zenith's insinuations that the Court of Appeals (including specifically Judge Cummings) is prejudiced and that its decision "destroys" Zenith's right to recover treble damages and makes the recovery of damages under the antitrust laws "impossible in the Seventh Circuit" are wholly unwarranted. The Court of Appeals in remanding the case has specifically provided that Zenith may recover damages.

Similarly without merit is Zenith's argument that the "public interest" requires that the Court ignore the defenses of release and limitations and bestow upon Zenith the entire $18,892,173 originally awarded, including possibly millions of dollars necessarily based on pre-release and pre-damage period conduct. Zenith, a giant in its industry, has already demonstrated an eagerness to receive

millions of dollars in "treble damages" without legal right (*i.e.*, its claim to some $30 million in treble damages as to England and Australia as to which the Court of Appeals and this Court held no damage had been proved). No "public policy" requires that the statute of limitations or releases given for valuable consideration should be ignored in this case. Indeed, the Court of Appeals' remand decision comports in every respect with public policy under the anti-trust laws. It in no way interferes with Zenith's right to receive damages to which it is lawfully entitled, while at the same time it implements the statute of limitations as a statute of repose, and preserves the integrity of the general releases executed by Zenith in 1957 in return for a substantial consideration.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DAMAGE AWARD SHOULD EXCLUDE DAMAGES RESULTING FROM CONDUCT OF THE CANADIAN POOL WHICH OCCURRED PRIOR TO THE RELEASES OR PRIOR TO THE LIMITATIONS PERIOD.

A. A Substantial but as yet Undetermined Part of the Damages Awarded Is Based Solely on Pool Conduct Which Took Place Prior to the Releases or Prior to the Limitations Period.

The significance of the release and limitations defenses cannot be fully understood without consideration of the record concerning the original award, which shows that a major portion of the amount awarded as to Canada was based solely upon "pre-damage period" (May 22, 1959-May 22, 1963) conduct and "pre-release" (September 27, 1957) conduct.

In its opinion this Court pointed out that:

> "Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market *on May 22, 1959, and throughout the damage period* rather than its actual 3% share. *Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages awarded, therefore, necessarily resulted from pre-damage period conduct*" (AA. 16; 395 U.S. at 116-17).

Since Zenith claimed that its beginning market as to television was less than one-fifth of what it would have been but for the pool's conduct (*i.e.*, it was 3% instead of 16%), a very substantial part of the claimed damages "necessarily resulted from pre-damage period conduct." Similarly, as to radio, Zenith claimed that its beginning share should have been about 13% rather than its actual share of about 4% (DX 220, A. 2661).

This Court also pointed out that:

> "It could also rationally be found from the evidence that Zenith, beginning in 1958 [*i.e.*, following the September 1957 settlement], could not have reached its maximum potential by May 22, 1959 . . ." (AA. 18; 395 U.S. at 118-19).

Thus, the amount of damages awarded for the period May 22, 1959 to May 22, 1963, included damages caused by activities of the pool which took place not only prior to the limitations period but also prior to September 27, 1957, the date of the release.[9]

The record amply demonstrates the correctness of these conclusions. Although Zenith represented by its counter-

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[9] The record shows that Zenith entered the Canadian market in 1958, following the September 1957 settlement and releases in the RCA-Zenith litigation (*e.g.*, A. 450; Finding XXX, A. 2905).

claim and supporting papers that it was not seeking to recover for acts prior to April 7, 1960 (see pp. 3-4, *supra*; pp. 42-43, *infra*), that pleading was quietly abandoned by Zenith's use of Defendant's Exhibit 220 (A. 2661-64) as the basis for computing damages.[10] That exhibit was prepared on the "mature" or "established" market theory and assumed that from the very start of the damage period, and in every part thereof, Zenith would have had exactly the same share of the Canadian market as it had of the United States market (DX 220, A. 2661-64). Zenith had been in the United States radio market since the 1920's (A. 3468) and had entered the United States television market in 1948 at its beginning (A. 3495). It had achieved its 16% share of the U.S. television market (and 13% of the radio market, A. 2661) as a result of having been in the market and building up its share over a period of many years. Thus, the theory underlying DX 220 was that Zenith was entitled to compute its damages for the period 1959-1963 as if it had been in the Canadian market since the 1920's as to radio and 1948 as to television, unhampered by pool conduct.

During the proceedings following entry of the original findings, the trial judge confirmed that his understanding was that the basis for estimating the amount of damages as to Canada was that "there would have been an established market but for the pool" (A. 3204). And the Zenith executives, Wright and Kaplan, who were recalled to explain their prior damage estimates as to England and Australia (see AA. 16 n. 12; 395 U.S. at 117 n. 12), testified that *as to Canada* the claimed market percentage on which

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[10] DX 220 is reproduced facing page 23 of HRI's Brief in No. 49, October Term, 1968. Apparently for convenience in computation this exhibit used a four-year period beginning June 1, 1959 rather than May 22, 1959, the actual beginning of the four-year damage period preceding the date of the counterclaim.

Zenith's damage calculation was based, was on the assumption that Zenith would have been in the Canadian market for many years prior to June 1, 1959, but for interference by the pool. Kaplan, for example, specifically said that an assumption underlying the damage calculation as to Canada was that Zenith "would have been doing business there for a *great many years* prior to the damage period" (A. 3465).[11] He also said that:

> "In Canada, our assumption was that we commenced the period starting June 1, 1959 as if we had had a *full-blown organization,* and *had enjoyed the benefits of doing business there for years prior to that date*" (A. 3440).

Wright similarly testified that Zenith's assumptions as concerns Canada included the assumption that on June 1, 1959, "but for the pool," Zenith would have had an established market in Canada, *i.e.,* it "would have had a going market there" (A. 3490).

Finally, although Zenith previously represented to this Court that "no one ever heard" of the established market theory until "respondents' present counsel injected it by way of motion to rehear the case",[12] Zenith has now ad-

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[11] Zenith now asserts that "there is no evidence that beginning four years prior to November 20, 1959 when the suit was started and in the intervening time up and until the beginning of the damage period Zenith absent the Pool could not have gained a mature market position. In fact every inference is that Zenith would have had ample time to do just that" (Z. Br. 35). In the first place, Zenith is barred from claiming damages resulting from conduct taking place prior to the damage period, or prior to the releases (pp. 22-42, *infra*). Second, there is no finding by the trial court, and no evidence which would support such a finding, that Zenith could have gained a mature market position in the period referred to by Zenith.

[12] Zenith Reply Brief in No. 49, October Term, 1968, p. 15.

mitted that its theory of recovery "assumed that absent the illegal conspiracy Zenith would have had a mature market position at the beginning of the damage period" (Z. Br. 25), and that "petitioner's damage exhibit" [DX 220] was based on the same assumption (Z. Br. 14).

B. The September 27, 1957 Releases Barred Recovery of Subsequent Damages Flowing from Pre-Release Conduct.

The releases in question were part of the settlement of prior litigation between Zenith and its subsidiary on the one hand and RCA, General Electric and Western Electric on the other hand.[13] In that suit RCA had sued for patent infringement and Zenith had counterclaimed charging RCA and the other two companies, brought in as cross-defendants, with involvement in an alleged conspiracy by reason of participation in patent pools in Canada, England, and Australia, and asserting the right to recover treble damages (PX 38-42, A. 2697-2750).

In September 1957, the *RCA-Zenith* litigation was settled without trial (PX 43, 48, A. 2751-52, 2783-86). According to Zenith's counsel the value of the settlement to Zenith was approximately $45 million (AA. 171).[14] Pursuant to the settlement agreement, Zenith executed general releases

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[13] RCA v. The Rauland Corporation and Zenith Radio Corporation, Civil Action No. 48 C 1818 in the District Court for the Northern District of Illinois, Eastern Division (A. 2697).

[14] Under the settlement agreement (PX 48, A. 2783-86) Zenith received a cash payment of $10 million representing single damages for Canada only, Zenith having decided it had no appreciable damage claims as to England and Australia (A. 652, 656-57). In addition, Zenith was forgiven past royalties and received worldwide royalty-free licenses under radio and black and white television patents, bringing the total value of the settlement to Zenith (according to its counsel) to $45 million (AA. 171).

under date of September 27, 1957 which by their terms included future damages based on past acts (A. 3051-3052). There was no reservation of rights against third parties.

Zenith has repeatedly taken the position that its present counterclaim involves the same alleged conspiracy or conspiracies charged in the *RCA-Zenith* case.[15] In addition, it relied extensively upon the exhibits identified in the *RCA* case.[16]

Concerning the releases, the Court of Appeals held:

> "Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the

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[15] *E.g.*, Finding XIX (A. 2901), Finding XXII (A. 2901-02) and Finding XXX (A. 2905-06), which specifically mention the RCA litigation; Zenith's pre-trial and post-trial briefs on the anti-trust issues: "The *same* conspiracy was the subject of a private treble damage action in this court brought in the form of a counterclaim filed by Zenith in a patent infringement action, similar to this suit *R.C.A.* v. *Zenith and Rauland Corporation,* 48 C 1818" (A. 3070, pp. 30-31 of pre-trial brief); and statements by Zenith's counsel, McConnell: opening statement (A. 121-25); during trial (A. 159-60); and closing argument (A. 831-34, 839-40, 849-50, 857, 886).

[16] At least 72 of the exhibits which Zenith introduced in this case had been marked as deposition exhibits in the RCA case. *E.g.*, DX 111, A. 1557; DX 117, A. 1637; DX 162A, dated May 22, 1928, A. 2047; DX 162B, A. 2050; DX 162C, A. 2052; DX 162D, A. 2058, 2062-63, 2065 (5 different exhibits from the RCA case); DX 163, A. 2068; DX 164, A. 2070; DX 170, A. 2101; Defendant's Bulk Exhibit 179, A. 2152, 2157, 2159, 2161-63, 2165, 2167, 2170, 2174, 2175, 2177, 2180, 2182-83, 2185-86, 2188, 2190-91, 2193, 2196-97, 2202, 2204, 2207, 2210, 2212, 2215, 2217, 2221, 2224, 2226, 2229, 2233, 2235, 2244, 2246, 2249, 2251, 2253, 2256, 2261, 2268, 2270, 2275, 2277, 2279, 2283, 2287, 2291, 2293, 2295, 2298, 2301 (54 separate RCA case exhibits); DX 213, A. 2513; DX 214, A. 2519. See also DX 122, A. 1691; DX 135, A. 1870; and DX 157, A. 2027, which appear to have been deposition exhibits in that case.

> Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases" (AA. 57) [Emphasis by the Court of Appeals].

The Court of Appeals was clearly correct in holding that: (1) the releases bar the recovery of future damages caused by acts which took place prior to the releases; and (2) HRI is entitled to the benefits of the releases.

1. The Releases Bar Recovery of Future Damages Caused by Conduct Which Took Place Prior to the Releases.

By the explicit terms of the releases, Zenith "released and forever discharged":

> ". . . all manner of action and actions, cause and causes of action [etc.] . . . damages [etc.] . . . claims and demands whatsoever, . . . which . . . Zenith . . . ever had, now has or . . . *hereafter can, shall or may have* for, upon or *by reason of any matter, cause or thing* whatsoever from the beginning of the world to the day of the *date of these presents* . . ." (A. 3051-52).

Thus, the releases expressly apply not only to damages up to the date of the releases but also to future damages resulting from conduct occurring prior to their execution. *Rotberg* v. *Dodwell & Co.*, 152 F.2d 100, 101 (2d Cir. 1945); *Sitchon* v. *American Export Lines, Inc.*, 113 F.2d 830, 831-33 (2d Cir. 1940), *cert. denied*, 311 U.S. 705 (1940); *Rice* v. *Trunkline Gas Co.*, 323 F.2d 394, 396-97 (7th Cir. 1963).

The question with respect to the legal effect of the releases here is whether Zenith on May 22, 1963, could have filed a suit and recovered from RCA, General Electric, Western Electric, or anyone else having the benefit of the

releases, that part of the damages awarded here which were caused by the activities of the pool which took place *prior* to the releases. The releases by their express terms foreclose such recovery (A. 3051-52), and Zenith has never denied this fact. Instead, Zenith argues that the effect of the Court of Appeals' holding is to *sanction a "future violation"* of the antitrust laws (Z. Br. 39) and to grant "HRI and the pool *immunity to operate forever* free from treble damage suits" (Z. Br. 41).

The Court of Appeals made no such holding, either expressly or impliedly. In fact, the effect of its holding is exactly the opposite. Rather than sanctioning "future violations," or giving HRI "a blank check to continue the pool" (Z. Br. 39), the Court of Appeals explicitly held that Zenith *is entitled to recover* for the damages resulting from damage period conduct (AA. 58-59).

The cases cited by Zenith, such as *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117, 119 (S.D.N.Y. 1941) and *Fox Midwest Theatres* v. *Means*, 221 F.2d 173, 180 (8th Cir. 1955) are inapposite. Nothing said in these cases even suggests that the releases here are contrary to the "public interest." Both of those cases state that it is against public policy to release "liability for *future violations* of the antitrust statutes" (221 F.2d at 180; 39 F. Supp. at 119). But the releases given by Zenith do not release liability for future violations but release only causes of action and damages which may result from conduct which took place prior to the release, and that is all the Court of Appeals held.

Nor is there anything in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955) (see Z. Br. 39) which supports Zenith's position here. In that case this Court held that a 1943 dismissal with prejudice did not, under the

doctrine of *res judicata,* bar recovery of damages based on *conduct* which was *subsequent* to the 1943 dismissal, the Court there saying, as quoted by Zenith, that:

> "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case" (349 U.S. at 328).

In reaching its decision in that case this Court noted that "[t]he *conduct* presently complained of was all subsequent to the 1943 judgment" (349 U.S. at 328). By the same token, the releases here only preclude recovery based on conduct prior to the releases and not damages based on subsequent conduct.

Aside from its contention that the releases somehow contravene public policy, the main basis for Zenith's release argument (as well as its limitations argument) is the erroneous contention that a treble damage cause of action does not accrue upon the occurrence of the illegal interference with the claimant's business which causes it to lose profits, but instead only accrues from day to day thereafter as the time passes when the claimant would otherwise have made the lost profits (Z. Br. 38). As we point out in discussing the limitations defense this contention is erroneous. A cause of action for present and future damages arises when wrongful conduct occurs having a damaging impact on the claimant (see discussion and citations, pp. 40-42, *infra*).

However, even if it were assumed that a cause of action for future lost profits had not accrued in 1957 when the releases were executed, the releases would nevertheless bar Zenith's claim for lack of market share and resulting loss of profits during the four-year damage period, to the

extent that the failure to have the claimed market share and profits resulted from pre-release conduct. The releases by their express terms release all "causes of action . . . damages . . . claims and demands" which Zenith "hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents . . ." (A. 3051-52). Clearly, such future damages resulting from pre-release conduct were within the explicit language of the releases.

Under Zenith's theory, private treble damage plaintiffs under the antitrust laws would not be able to recover the loss of profits in the future as a result of injury inflicted to their business by illegal conduct prior to the commencement of the action, and the parties could never settle a claim for such future damages from past acts. The effect of Zenith's theory would be that, despite the unequivocal language of the releases, Zenith in 1963 could have sued any of the alleged co-conspirators, including RCA and the other companies specifically named in the releases, for the lack of market share caused by pre-release conduct, and for resulting loss of profits in the 1959-1963 period.

If it were the law that an antitrust claimant cannot include future damages from past conduct in a release he gives in settlement of an antitrust claim, the salutary benefits of settlements would be lost and the policy of the law to encourage settlements would be thwarted. The parties could not finally settle antitrust claims and the federal courts might well be flooded with actions by those plaintiffs who in the past years have settled treble damage cases, now claiming that damages incurred after the settlement as a result of pre-settlement conduct were not legally released and could be recovered in a new suit.

2. HRI Is Entitled to the Benefit of the Releases.

Zenith's brief does not expressly take the position that a release given to one co-conspirator, which reserves no rights against others, does not release other co-conspirators. Rather, Zenith's argument is directed to the specious proposition that the effect of the releases, as construed by the Court of Appeals, is to give immunity to future illegal conduct. That argument, with which we have already dealt (pp. 24-27, *supra*), does not go to the question of who is entitled to the benefit of the releases.

Of course, Zenith could hardly be heard to argue at this point in the litigation that HRI is not entitled to the benefit of the releases because it has already admitted during proceedings in the trial court that HRI *is* entitled to the benefit of the releases, and contended only that the releases did not apply to future damages.

> "The Court: What is your reply to his [HRI counsel's] contention that the 1957 release also released Hazeltine from anything prior to the date of the release?
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> "Mr. McConnell [Zenith counsel]: Well, any money damages which had accrued prior to 1957, if they were joint tort feasor, which we allege that they were, would be released . . ." (A. 3035).

However, aside from this admission, the law is clear that HRI is entitled to the full benefit of these releases, including the release of future damages from past acts.

In deciding the release issue in this case, the Court of Appeals applied the modern rule set forth in the Restatement of Torts §885(1) (1939). That rule is that a party giving a release may reserve rights against others, but if as here, he does not do so, the release given to one alleged joint

tortfeasor releases all.[17] There is no disagreement among the circuits with respect to the applicability of this rule to antitrust cases. All courts of appeals faced with the question have held that the release of one alleged co-conspirator in an antitrust case releases all, in the absence of an express reservation of rights against others. In addition to the decision of the Seventh Circuit in the instant case, the Third, Fifth and Ninth Circuits reached the same results in *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F.2d 5, 6-7 (3d Cir. 1957); *Miami Parts and Spring, Inc.* v. *Champion Spark Plug Co.*, 402 F.2d 83, 84 (5th Cir. 1968); and *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F.2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). This rule has also been applied repeatedly by district courts.[18] Thus, there is no basis whatever for Zenith's assertions that the Court of Appeals "extend[ed] the common law rule as to releases" (Z. Br. 38).

In the *Twentieth Century-Fox* case, the Ninth Circuit very thoroughly considered the questions involved. Holding that the effect of a release in a federal antitrust case should be governed by federal law, the court concluded that the

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[17] The old common law rule was that rights against third parties could not be reserved in the release of a joint tortfeasor. See discussion of this rule in Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., 351 F.2d 925, 929, 931 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[18] California Concrete Pipe Co. v. American Pipe & Construction Co., 288 F. Supp. 823, 824-26 (C.D. Cal. 1968); Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F. Supp. 921, 922 (S.D.N.Y. 1955); see also Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48, 53 (S.D.N.Y. 1968).

rule of the Restatement of Torts is the federal law on the question (351 F.2d at 929) and stated that:

> "Appellants . . . advance what apparently is the modern majority rule that joint tort-feasors are released *unless* an express contrary intention is demonstrated. Thus, as noted by appellees, the Supreme Court opinion in Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 84 S.Ct. 1526, 12 L.Ed. 2d 457 (1964), does repudiate the old rule, but, in doing so, it cites with approval the current Restatement position, . . ." (351 F.2d at 930-31) [emphasis supplied by the Court].

The court also noted the sound basis for the Restatement rule:

> "The Restatement rule does not prevent an injured party from reserving rights against one or more joint tort-feasors while releasing others. It merely requires that he announce his intent, and express that reservation in the release agreement. . . . We find it difficult to believe that the incorporation in a release of a clear statement of its scope and intent will place too heavy a burden on counsel charged with the responsibility of drafting the instrument" (351 F.2d at 930).

In the *Dura Electric Lamp* case, the Third Circuit had before it a release given to General Electric in substantially identical terms to the release involved here. What Judge Goodrich said for the court there is particularly applicable here:

> "It is to be noted that the language of the release is as general as language can be. There is nothing by which it may be interpreted as a covenant not to sue. There is nothing which even hints at a reservation of rights. There is nothing in the facts here which looks to a reexamination of the release based upon fraud or mutual mistake or anything of the sort. Michael Rose Productions v. Loew's, Inc., D.C.S.D.N.Y. 1956, 143

F. Supp. 606; McDermott v. Botwick, App. Div. 1956, 38 N.J. Super. 528, 119 A.2d 776. The transaction was one conducted between lawyers so we do not have an instance where a court may strive to extricate an uninformed layman from the consequences of a hasty settlement. As the court below said at the conclusion of the argument upon the motion for summary judgment, '[I]f there ever was [a] case * * * which seems to come within the confines of the general rule that release of one tort-feasor is a release to all, this is it.' That is our view also" (249 F.2d at 7).

There is nothing in *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U.S. 661 (1944) or *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942), either directly or by way of analogy, which would indicate that the releases should not benefit HRI.[19] Those cases stand for the proposition that federal law should control in deciding federally created rights or liabilities, and the Court of Appeals here applied the federal law as to the effect of the releases. Also, there is an important distinction between the type of relief sought in *Mercoid* and *Sola* and that sought by Zenith. In *Mercoid* and *Sola* the question was whether an estoppel could bar a party potentially aggrieved by an antitrust violation from asserting the illegality of the conduct. Application of the estoppel doctrine there would have permitted the continuation of possibly illegal conduct, leaving the victim no way to question it. Here, however, the Court of Appeals did not hold that the release would bar a suit either for injunctive relief or damages based upon a con-

[19] *Mercoid* held that a claim for damages and injunctive relief based on patent misuse was not barred by failure to plead misuse as a defense to an earlier infringement claim. *Sola* held that a patent licensee could contest the validity of the patent for the purpose of questioning the legality of a price fixing clause in the license.

tinuation of the alleged illegal conduct. On the contrary, the case was remanded so that the damages caused by damage period conduct could be determined.

Without actually arguing that the releases do not apply to HRI, Zenith attempts to condemn them by using the term "constructive release" and implies that somehow the established rules with respect to releases should not apply "in view of the public interest involved" (Z. Br. 39). There is no public interest requiring departure from the established federal rule that alleged joint tortfeasors are released unless a right against them is reserved. If Zenith had desired to exclude claims against third parties for past and future damages arising out of the past conduct of the alleged conspirators, it could have done so by a simple reservation in the releases given to RCA, General Electric and Western Electric. Zenith was represented by the same experienced counsel representing it in this litigation and gave unqualified releases completely without any reservation of rights against third parties (PX 48, A. 2783, 2786, A. 3049-53).

Moreover, Zenith's contention that the policy of the antitrust laws should be construed to foreclose a holding which gives the releases their recognized legal effect is particularly inapplicable under the circumstances of this case. Here Zenith has argued and the trial court has held that declarations of HRI's alleged co-conspirators were admissible against HRI (*e.g.*, A. 398-410) and that HRI as a co-conspirator was "legally liable for all the acts of the Pools and its members" in furtherance of the conspiracy (Conclusion of Law X, A. 2910, 2911). Since a co-conspirator is liable for the acts of his co-conspirators even if he himself performs no such acts, there is even more reason for applying the rule that a release given to his alleged co-conspirators which does not reserve any rights against him, also releases him.

In summary, the complete lack of merit in Zenith's position is highlighted by the fact that Zenith has already conceded that the releases do apply to HRI (p. 28, *supra*). The releases do not release claims based on *future violations of* law, but only future or residual damage which may result from *past conduct* occurring up to the "date of these presents" [September 27, 1957] (A. 3051-52). Zenith's "public interest" argument is nothing more than an attempt to repudiate the releases freely given in return for substantial consideration. As Zenith has admitted, the releases apply to HRI (and to RCA, GE, Western Electric and all other alleged joint tort-feasors) as to *past damages* suffered from pre-release conduct and there is no reason in public policy why the releases should not also apply to HRI (and to the other alleged joint tort-feasors) as to future damages resulting from pre-release conduct.

C. The Statute of Limitations Bars Recovery of Damages Flowing from Pre-Limitations Period Conduct.

In its prior opinion this Court said it was not passing on the question whether "damage period injury from pre-damage period conduct is recoverable" when the statute of limitations has been interposed as a defense (AA. 17 n. 13; 395 U.S. at 117 n. 13), so that on remand this question was left for decision by the Court of Appeals.

The Court of Appeals' holding on that question can be summarized as follows: The cause of action accrues and the statute of limitations starts to run from the damage-causing conduct. The statute of limitations is *not* a complete bar to Zenith's damage claim because there was illegal damage-causing pool conduct within the period of limitations. But the statute of limitations *does* bar that part of the amount of damages awarded which was caused by conduct of the pool prior to the limitations period. Accordingly,

the Court of Appeals concluded there should be a remand to the trial court to permit HRI to offer evidence "aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391" (AA. 60-61). This holding is consistent not only with the decisions of this Court but also the uniform decisions of the courts of appeals in other circuits.

As long ago as 1913 this Court said that no private action lies for a conspiracy unless it has a damaging impact on the claimant. *Nalle* v. *Oyster,* 230 U.S. 165, 182 (1913). The lower federal courts have uniformly followed that rule.[20] As the Ninth Circuit pointed out in *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.,* 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied,* 340 U.S. 943 (1951):

> "[P]rivate civil antitrust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators. . . ."

Thus, the cause of action accrues and the statute of limitations starts to run upon the occurrence of the damage-

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[20] Momand v. Universal Film Exchs., Inc., 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949); Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir. 1956), *cert. denied,* 352 U.S. 844 (1956); Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc., 153 F. Supp. 589, 593 (D.N.J. 1957), *aff'd,* 307 F.2d 210 (3d Cir. 1962), *cert. denied,* 372 U.S. 929 (1963); Crummer Co. v. duPont, 223 F.2d 238, 247-48 (5th Cir. 1955), *cert. denied,* 350 U.S. 848 (1955); Sherman v. Goerlich's, Inc., 238 F. Supp. 728, 730 (E.D. Mich. 1963), *aff'd per curiam,* 341 F.2d 988 (6th Cir. 1965), *cert. denied,* 382 U.S. 830 (1965); Garelick v. Goerlich's, Inc., 323 F.2d 854, 855-56 (6th Cir. 1963); Baldwin v. Loew's Inc., 312 F.2d 387, 390 (7th Cir. 1963).

causing illegal conduct. *Momand* v. *Universal Film Exchs., Inc.*, 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Rutkin* v. *Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956), *cert. denied*, 352 U.S. 844 (1956); *Crummer Co.* v. *duPont*, 223 F.2d 238, 247-48 (5th Cir. 1955), *cert. denied*, 350 U.S. 848 (1955).

Nevertheless, Zenith argues that its cause of action for lost profits in this case did not accrue until the time passed during which Zenith would have otherwise made those profits and that a new cause of action arises each day additional profits are lost (Z. Br. 33).

If Zenith's position were the law, the purpose of the statute of limitations as a statute of repose would be defeated. For example, a claimant could wait ten, twenty or thirty years after the conduct which injured him had occurred and bring a cause of action for the loss of profits he had suffered during the preceding four years by contending that his profits during that period of time were not as large as they otherwise would have been but for the earlier conduct of the defendant. Application of Zenith's position here would mean that the statute of limitations is no bar to recovery of lost profits for the four year period beginning May 22, 1959, sustained as a result of conduct which took place as long ago as 30 years prior to the start of the limitations period. Yet that is exactly the result which would be produced because the damages at issue under the statute of limitations defense in this case are those representing profits lost by Zenith because pre-damage period pool conduct (going back to the 1920's) allegedly prevented it from building up its market share (pp. 4-5, 19-22, *supra*).

When faced with the contention made here by Zenith, the courts have repeatedly held that the statute runs from the time of the damage-causing conduct and that "[t]he period of limitations is not extended by the fact that damages from

that injury may have continued to accrue. . ." *Fleischer* v. *A.A.P., Inc.*, 180 F. Supp. 717, 723 (S.D.N.Y. 1959). See also *Baldwin* v. *Loew's Inc.*, 312 F.2d 387, 390-91 (7th Cir. 1963).

In *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. N.J. 1957), *aff'd*, 307 F.2d 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), the court pointed out that:

> "The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable [six-year] statute of limitations. . . .
>
> "The plaintiff contends that it seeks to recover only those damages which it has sustained within the six year period next preceding the commencement of the action. These damages are not recoverable in the absence of a specific allegation that they were proximately caused by an overt act committed within the same period" (153 F. Supp. 593).

Similarly, in *Crummer Co.* v. *duPont*, 223 F.2d 238, 247 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955), the Court of Appeals for the Fifth Circuit held:

> "Thus, while successive claims would arise out of successive unlawful acts and consequent damages, such claims would have to do, and be concerned with only such successive occurrences and the damages and injuries caused by such acts, and such occurrences would not extend the period of limitation as to earlier acts done and injuries caused thereby."

Accord: *Momand* v. *Universal Film Exch., Inc.*, 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727,

729 (D. Del. 1950), *aff'd per curiam,* 185 F.2d 407 (3d Cir. 1950), *cert. denied,* 341 U.S. 950 (1951); *Laitram Corp.* v. *Deepsouth Packing Co.,* 279 F. Supp. 883, 888-89 (E.D. La. 1968).

Zenith's argument is based upon a misreading of *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F.2d 742, 750 (9th Cir. 1936), *cert. denied,* 299 U.S. 613 (1937), and of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968) (Z. Br. 33-35).[21]

In the *Foster & Kleiser* case, the court did not hold that a new cause of action arises or that the statute begins to run each time further losses are suffered. When the Ninth Circuit said, "the cause of action arises when the damage is sustained and the statute of limitations begins to run at that time" (85 F.2d at 751), the court was referring to "damage" in the sense of an invasion of plaintiff's rights by illegal conduct of the defendant, not to each item of resulting damages or to each day during which the effects of that invasion may continue to be felt.

In fact, the interpretation which Zenith seeks to place on the *Foster & Kleiser* case was specifically rejected by the Ninth Circuit in its later decision in *Steiner* v. *Twentieth Century-Fox Film Corp.,* 232 F.2d 190, 194-95 (9th Cir. 1956). The plaintiff there contended that a number of cases cited, including the *Foster & Kleiser* case, should be construed "to mean that the statute of limitations runs not

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[21] Zenith's reliance upon *Radovich v. National Football League,* 352 U.S. 445 (1957) is similarly misplaced. Zenith cites that case as authority for the statement that the Court of Appeals' position is "completely untenable under the terms of the Clayton Act itself" (Z. Br. 32). In fact, the language quoted by Zenith had to do with the sufficiency of pleadings and had nothing whatsoever to do with the issues involved here.

from the overt act, but from the damages sustained" (232 F.2d at 195). However, the Ninth Circuit rejected this contention, saying:

> "We do not construe these cases to substantiate appellant's contention. These decisions merely hold that in order to start the running of the statute of limitations there must be damage occasioned by an overt act" (232 F.2d at 195).

Holding that the statute begins to run when "the blow which caused the damage was struck," the court pointed out that:

> "Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run" (232 F.2d at 195).

The error in Zenith's reading of the *Foster & Kleiser* case is in its assumption that the "damage is sustained" only when the period of time passes when plaintiff would otherwise have made the lost profits. Damage is "sustained" in virtually all types of actions when the injury takes place. For example, a plaintiff in a suit for physical injury to business property may not yet have expended the money to repair or replace his property or may not yet have lost the profits he will lose until his business property is restored, but he has nevertheless "sustained the damage" and his cause of action has accrued.

Zenith's argument as to *Foster & Kleiser* erroneously assumes that "damage" is the same thing as "damages." On the contrary:

> "The 'injury' referred to by the Act [15 U.S.C. § 15] means not 'damages' in the sense of the measure of recovery, but rather an act or occurrence which impairs the economic position of the plaintiff. If the loss of future profits or some other monetary loss is rendered

inevitable by such an act or occurrence, the wrong is complete, and the statutory period of limitations against suit then commences to run." *Emich Motors Corp.* v. *General Motors Corp.*, 1955 Trade Cas. ¶67,960 at p. 70,135 (N.D. Ill. 1955), *aff'd*, 229 F.2d 714 (7th Cir. 1956).[22]

The decision of this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), neither decided nor discussed the question whether recovery could be had for activities occurring prior to the relevant damage period. Instead, the point being considered in footnote 15, from which Zenith quotes (Z. Br. 34-35), was whether an *initial* impact on Hanover in the year 1912, not sued on within the statutory period after that date, barred recovery on the current claim which was based on a continuation of United's illegal lease-only practice and the resulting impact on Hanover. This Court held that failure to sue within the limitations period after 1912 did not bar the recovery sought by Hanover (392 U.S. at 502), but the only recovery sought and permitted was on the basis of damaging impact flowing from rental payments which Hanover was forced to pay United during the damage period applicable in that case:

> "Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it *during the damage period* and showed the amount of the overcharge . . ." (392 U.S. at 494).

The fact that the only damages awarded in *Hanover* were those caused by illegal conduct *within* the applicable damage period is shown by the statement from the Court of Appeals' opinion in *Hanover*, 377 F.2d 776 (3d Cir. 1967), part of

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[22] See also Analysis, CCH Trade Reg. Rep. ¶9141.

which Zenith itself (Z. Br. 35) quotes:

> "[W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover *for the separate invasion of its rights which occurred within the period*" (377 F.2d at 795).

Thus, the result reached by the Court of Appeals in this case is totally in accord with the result reached in the *Hanover* case.

The statute provides that any cause of action "shall be forever barred unless commenced within four years *after the cause of action accrued*" (15 U.S.C. §15 (b)). A cause of action "accrues" when the plaintiff has the right to sue; thus, to the extent that Zenith could have recovered the damages awarded here in a suit filed prior to May 22, 1959, its recovery of those damages is "forever barred" because the cause of action for those damages accrued more than four years prior to the commencement of Zenith's action.

Subject to the bar of the September 27, 1957 releases, prior to May 22, 1959 Zenith could not only have sued for the profits it had by then actually lost resulting from pool conduct during the preceding four years, but also the profits it would lose in the future by reason of the pool's interference with Zenith's market build-up during the preceding four years.[23] This fact was made abundantly clear in Judge Wyzanski's frequently cited opinion in *Momand* v. *Universal*

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[23] Since the September 1957 releases bar all recovery of damages flowing from pre-release conduct, the Court of Appeals' holding that damages should be limited to those caused by damage-period conduct relies upon the statute of limitations only to the extent of barring recovery based on pool conduct after the releases and before May 22, 1959, a period of less than two years (see AA. 57).

Film Exch., Inc., 43 F. Supp. 996 (D. Mass. 1942), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949). In that case Judge Wyzanski pointed out that:

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, *not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion,* including what he has suffered during and will suffer after the trial. Lawlor v. Loewe, 235 U.S. 522, 536, 35 S.Ct. 170, 59 L. Ed. 341" (43 F. Supp. at 1006).

As long ago as *Lawlor* v. *Loewe*, 235 U.S. 522, 536 (1915) this Court, through Mr. Justice Holmes, made it clear that in a private antitrust action the plaintiff can recover damages sustained subsequent to the action if such damages "were the consequence of acts done before and constituting part of the cause of action declared on." Accord: *A. C. Becken Co.* v. *Gemex Corp.*, 314 F.2d 839, 840 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963) (Court of Appeals approved a treble damage award which included damages suffered by the plaintiff after the date of the filing of his suit but caused by conduct before the filing of the suit); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 673 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 396 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (plaintiff held entitled to future damages "proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed"); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 666 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965) (Court of Appeals affirmed a jury verdict which specifically attributed damages to loss of profits subsequent to the filing date of the complaint).

Since in a suit commenced prior to May 22, 1959, Zenith could have recovered the future expected profits lost by reason of the conduct of the pool during the four years prior to that date, the Court of Appeals was correct in holding that to the extent the damages awarded here included recovery for such profits lost by reason of conduct before the limitations' period, they were barred by the statute of limitations.

D. The Question of Tolling of the Statute of Limitations Is Not Before This Court.

Zenith asserts (Z. Br. 35-37) that the question is presented whether the four-year statute of limitations was tolled during the pendency of *United States* v. *General Electric, et al.* (Civil Action No. 140-157, S.D.N.Y.), in which Hazeltine Corporation was named as co-conspirator but not joined as a defendant. However, this question was not before the Court of Appeals and thus is not before this Court.

The specific ground on which the Court of Appeals rejected Zenith's tolling argument was that the issue was not before it since Zenith had not asserted tolling in the trial court. The issue was not presented to the trial court and was raised for the first time on appeal. The Court of Appeals also commented in *dictum* that under the most recent case in the circuit, tolling did not apply to a non-defendant in a government suit (AA. 59 n. 3).

The Court of Appeals' decision on this issue was clearly correct. Not only was the issue of tolling never presented until the appeal stage of this case, but any claim of tolling would be in *direct conflict* with the sworn representations and statement of Zenith's counsel in the trial court which formed the basis for the granting of leave to file the counterclaim.

Zenith's answer to HRI's patent infringement complaint was filed on April 7, 1960 (A. 1, 14-19). It alleged in paragraphs 12 and 13, domestic patent practices and patent pools in Canada and elsewhere, as misuse and "unclean hands" defenses, but asserted no counterclaim (A. 14-19). Approximately three years later on May 22, 1963, Zenith was granted leave to file and filed its counterclaim alleging, among other things, injury to its Canadian business (A. 2, 64-69).

In support of its motion for leave to file this counterclaim three years after the answer, Zenith filed the affidavit of Francis W. Crotty, a Zenith vice president and patent counsel, who was an attorney of record in this case (A. 63). In the affidavit Crotty represented to the Court that the "*matters* alleged in paragraphs 6-9 of defendant's counterclaim, to which this affidavit is attached, and *which are the proximate cause of damages alleged* and require the relief sought in said counterclaim, *occurred after the filing of the answer herein*" (A. 63, para. 2). A similar representation was made in Zenith's motion for leave to file, where Zenith counsel represented that the counterclaim arose out of the matters set forth in defendant's answer, "*and current related unlawful activities* of plaintiff occurring since the filing of the answer *which activities are the proximate cause of* present and continuing *damage* to defendant sustained after the filing of the answer" (A. 62). Thus, Zenith obtained leave to file its claim for damages on the basis of the express representation that it was only claiming damages resulting from alleged illegal activities occurring *after* April 7, 1960, the date Zenith filed its answer.

To rely upon tolling by reason of the pendency of government litigation the claimant should affirmatively allege the necessary facts as a part of the cause of action. See *Tague* v. *Balaban*, 146 F. Supp. 356, 358 (N.D. Ill. 1956); *National*

& Transcontinental Trading Corp. v. *International General Electric Co.*, 15 F.R.D. 379, 382 (S.D.N.Y. 1954).[24] Zenith's counsel well knew that tolling should be pleaded if it was to be relied upon. In the amended and supplemental counterclaim filed by Zenith in the RCA-Zenith litigation (PX 42, A. 2743-50), Zenith expressly set forth government litigation and alleged "tolling of the statute of limitations because of said Government suit" (A. 2746).

Zenith now argues that it did not plead tolling of the statute of limitations in the trial court "since recovery of damages was limited to the four-year statutory period" and since it had no duty to anticipate the statute of limitations defense raised by counsel for HRI (Z. Br. 36). Whatever the merits of these contentions in other circumstances, they certainly have no application here. For Zenith to have pleaded or relied on tolling, it would have been necessary to explain to the trial court why it chose to wait *over three years* after the filing of its answer to file its counterclaim for damages. Instead, the Crotty affidavit and Zenith's motion (A. 62, 63) affirmatively represented to the trial court that the damages sought in the counterclaim were to be compensation for the effects of injurious conduct *allegedly* committed *after* April 7, 1960. Any attempt to rely on pre-damage period conduct on the ground of tolling of the statute of limitations, would have been in *direct conflict* with Zenith's representations regard-

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[24] The rule here is analogous to the requirement that "fraudulent concealment" must be pleaded if it is to be relied on as tolling the statute of limitations. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961); Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); and Picoult v. Ralston Purina Co., 1969 Trade Cas. ¶72,681, p. 86,432 (S.D.N.Y. 1969).

ing the scope of its damage claim, made and sworn to in order to obtain leave to file the counterclaim.[25]

This situation is analogous to *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961) where the Second Circuit held that plaintiff had not only failed to plead tolling based on "fraudulent concealment", but that it could not be subsequently pleaded because "the complaint not only does not allege concealment but *substantially negates it*" (288 F.2d at 88). Nothing could more "substantially negate" a claim of tolling and the right to rely on pre-damage period conduct as a basis for an award of damages than Zenith's sworn representation to the court that its claim for damages was based on "matters ... which ... occurred *after* the filing of the answer herein" [April 7, 1960] (A. 63).

Even if tolling had applied, it would not mean that the original award as to Canada should be reinstated. First, tolling has no effect whatsoever on the releases which limit Zenith's damages to those resulting from conduct after September 27, 1957 (pp. 22-33, *supra*). Secondly, tolling would enable Zenith to rely upon conduct going back only to November 24, 1954, four years prior to the commencement of the government's case against General Electric (PX 44, A. 2754). As was made clear both by the findings of fact adopted by the trial court and by the testimony of Zenith's

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[25] At page 35 of its brief Zenith says that "this Court indicated that the statute of limitations even if applicable would not run during the pendency of the instant suit and that the counterclaim would relate back to the filing of the instant suit . . ." (Z. Br. 35). Zenith does not cite any place in this Court's opinion, but apparently has reference to the statement in footnote 2 (AA. 8; 395 U.S. at 108). However, the Court did not there "indicate" that there *would be* a relation back but instead said that "*no argument was made that the counterclaim*, in whole or in part, *related back* to an earlier pleading. . . ." In fact Zenith could not have relied upon relation back here because to do so would have been in direct conflict with its sworn representation.

witnesses, the damage awarded was based upon an assumed ability to collect for the effects of pool conduct going back long prior to November 1954—in fact, back to the 1920's (see pp. 4-5, 18-22, *supra*).

Since the basis for the Court of Appeals' decision on tolling was that the issue was not properly before it, the issue of tolling as to non-government defendants is not before this Court. Nevertheless, we will set forth briefly the factors which we believe indicate there is no tolling as to persons not named as defendants in a government case.

Neither *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Co.*, 381 U.S. 311 (1965), nor *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965) holds that the statute of limitations is tolled as to non-defendants in the government case. That question was not before the Court in either case. In *Minnesota Mining* the question was whether a Federal Trade Commission proceeding was the type of proceeding which would toll the statute of limitations. In *Leh* the issue was whether the conspiracy charged in the private suit was based "in whole or in part" on that charged in the government action.

In a long line of decisions prior to the *Minnesota Mining* and *Leh* cases, the lower federal courts consistently held that there was no tolling with respect to private treble damage defendants who were not defendants in the government action.[26]

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[26] Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284, 292 (7th Cir. 1954); Momand v. Universal Film Exch., Inc., 43 F. Supp. 996, 1011 (D. Mass. 1942), *aff'd*, 172 F.2d 37, 48 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527, 536 (D. Minn. 1959), *aff'd*, 289 F.2d 418 (8th Cir. 1961); Court Degraw Theatre, Inc. v. Loew's Inc., 172 F. Supp. 198, 200 (E.D.N.Y. 1959); Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216, 218-19 (D. Minn. 1957); Electric Theatre Co. v. Twentieth-Century Fox Film Corp., 113 F. Supp. 937, 945 (W.D. Mo. 1953); Levy v. Paramount Pictures, Inc., 104 F. Supp. 787, 789 (N.D. Cal. 1952); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446, 455 (D. Utah 1951).

Contrary to the suggestions in Zenith's brief (Z. Br. 37) and in the Third and Eighth Circuit cases which Zenith cites,[27] it is not true that all decisions prior to *Minnesota Mining* and *Leh* relied upon the estoppel concept. Many courts grounded their refusal to toll the statute of limitations upon the plain meaning of the language of the act. See *Momand* v. *Universal Film Exch., Inc.*, 43 F.Supp. 996, 1011 (D. Mass. 1942), *aff'd*, 172 F.2d 37, 48 (1st Cir. 1948); *Electric Theatre Co.* v. *Twentieth Century-Fox Film Corp.*, 113 F.Supp. 937, 945 (W.D. Mo. 1953); *Christensen* v. *Paramount Pictures, Inc.*, 95 F.Supp. 446, 454-55 (D. Utah 1951). See also, *Union Carbide Corp.* v. *Nisley*, 300 F.2d 561, 570-71 (10th Cir. 1962), *appeal dismissed*, 371 U.S. 801 (1962). In the *Union Carbide* case, after recognizing that the tolling provisions of Section 5(b) are *not* "confined to or governed by the evidentiary rules of estoppel" applicable to Section 5(a), the Tenth Circuit concluded that tolling ceased as to any particular named defendant upon that defendant's dismissal from the government proceeding (300 F.2d at 570, 571).

Zenith seeks to brush aside the Seventh Circuit's decision in *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F.2d 284 (7th Cir. 1954) and presumably other cases on the ground that those cases were decided before Section 5 of the Clayton Act was amended in 1955 (Z. Br. 37). However, the only inference which can be drawn from the legislative history of the amendment is that no change in the existing law (that tolling was not applicable to Government non-defendants) was intended. The House Judiciary Committee Report[28] concerning the 1955 amendment set forth

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[27] Hardy Salt Co. v. State of Illinois, 377 F.2d 768 (8th Cir. 1967), *cert. denied*, 389 U.S. 912 (1967); State of New Jersey v. Morton Salt Co., 387 F.2d 94 (3d Cir. 1967), *cert. denied*, 391 U.S. 967 (1968).

[28] H. R. Rep. No. 422, 84th Cong., Ist Sess. (1955).

and discussed its purposes, namely, to permit the government to sue for single damages, to provide a uniform four-year statute of limitations and to provide for tolling of the statute of limitations during the pendency of the government litigation and for one year thereafter. (The then existing statute provided for tolling only during pendency of the litigation.) No change was made in the existing language requiring that in order for tolling to apply, the private suit must be "based in whole or in part on any matter complained of" in the government proceeding. This language had been universally interpreted by the courts to apply tolling only as against parties who were in the government litigation.[29] Further, there is nothing in the report indicating any purpose to extend tolling to any party other than defendants in the government litigation.

While the legislative history concerning the Clayton Act of 1914 contains very little material on the tolling provision, House Report No. 627, 63d Cong., 2d Sess. (1914) at p. 14, referring to what is now Section 5(b), confirms that the intent was that the statute apply only to those who were defendants in the government litigation:

> "This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts *of the defendant* during the pendency of the suit or proceeding instituted by or on behalf of the United States."

If this Court decides, contrary to our contention, to consider the tolling issue asserted by Zenith, the sole question before this Court would be: What did Congress intend?

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[29] In fact, the House Judiciary Committee Report on the 1955 amendments, in discussing the subject of limitations, referred to two of the cases, Momand v. Universal Film Exch., Inc., 43 F. Supp. 996 (D.C. Mass. 1942) and Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D.C. Utah 1951), which had construed the statute to *limit* tolling to parties named in the government litigation; H.R. Rep. No. 422, 84th Cong., 1st Sess. 7, 9 (1955).

We respectfully submit that when Congress amended the section in 1955 but did not change the language that had been uniformly interpreted as limiting tolling to parties to the government litigation, there is no basis to conclude that Congress intended to extend tolling to persons who were not defendants in the government litigation.

Zenith raises the issue of "tolling" in an attempt to save a damage award which erroneously relied on pre-limitations period conduct. But tolling *could not* justify the award, because of the bar of the 1957 releases; and because the award is based in part on conduct going back to the 1920's; and because assertion of tolling would be a repudiation of Zenith's representation which formed the basis for leave to file the counterclaim in the first place.

E. The Court of Appeals Properly Ruled that the Affirmative Defenses Were In the Case.

In its opinion, this Court referred to the question whether the defenses of release and limitations were in fact in the case, pointing out that:

> "HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for 'leave to file' defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. . . . The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus *either* rejecting the statute of limitations defense *or* considering it to have been waived. . ." (AA. 17 n. 13; 395 U.S. at 117 n. 13).[30]

[30]Since the Court referred to both the defense of limitations and the defense of release in its statement that the trial court granted leave to file the defenses, the statement at the end of the above quotation concerning the limitations defense obviously applied to both defenses.

Noting that "[t]he parties have not argued the matter here," the Court said: "we make no further effort to penetrate the confusion surrounding this issue. . ." (AA. 17 n. 13; 395 U.S. at 117 n.13).

On remand, the matter *was* argued by the parties and the Court of Appeals decided that the trial court's failure to give effect to the defenses was on the ground that they had no merit, and not on the ground of waiver. Pointing out that the trial court had permitted the defenses to be filed over Zenith's objections that they had been waived, and then denied HRI's motion to dismiss based on the defenses, the Court of Appeals said:

> "It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery" (AA. 56).

The court then proceeded to consider the defenses and ruled on their effect (see pp. 10-11, *supra*).

In its Petition for Certiorari, Zenith erroneously asserted that this Court's statement in footnote 13 (AA. 17; 395 U.S. at 117) "was a clear holding that the trial court had properly ruled that those affirmative defenses were not in the case" (Z. Pet. Cert. 11). Zenith has apparently abandoned this assertion, but instead argues (Z. Br. 41-45) that this Court should *now* hold that (1) the trial court held that the defenses were waived and by granting leave to file them did not relieve the waiver and (2) the trial court did not have the power after entry of findings to relieve any waiver of those defenses which may have been created by the failure to plead them with the reply to Zenith's counterclaim. There is no merit in either of Zenith's contentions.

1. By Granting Leave to File the Defenses Prior to Judgment the Trial Court Relieved Any Lateness In Filing.

Following entry of the findings but prior to entry of judgment, HRI's new counsel entered the case and filed a

written motion entitled "Motion for Withdrawal of Antitrust Findings and Conclusions and for Other Relief" (A. 2939-51). Among other things, this motion asserted that the damages awarded to Zenith by the findings were barred by the general releases and by the statute of limitations (A. 2939). On March 30, 31, and April 1, 1965, again before judgment, this motion was the subject of extensive oral argument in the trial court, and HRI's counsel there urged that all or part of Zenith's claim for damages was barred by the statute of limitations and the releases (*e.g.*, AA. 248). Zenith argued that the limitations defense had been waived by failure to plead it earlier and also that, in any event, neither the statute of limitations nor the release constituted a bar to any part of the damages claimed by Zenith in this case (*e.g.*, AA. 173, 187, 189, 250-51).

On April 1, 1965, at the conclusion of his argument in support of the broad motion for withdrawal of the antitrust findings and for other relief, HRI's counsel orally repeated the motion as to these defenses, again asking leave to file the affirmative defenses "as a formal pleading of release and statute of limitations" (AA. 250). The trial court clearly understood that by its motion HRI was "seeking to file these new pleadings" (AA. 250), and Zenith's counsel argued that the motion should be denied because "I think it's too late" (AA. 251). Nevertheless, the trial court granted the motion (AA. 251), and stated that the defenses should be filed "*nunc pro tunc*" as of April 1, *i.e.*, before entry of judgment (AA. 254). These pleas were thereafter filed (A. 3049-53), but HRI's motion to dismiss the counterclaim on the ground of these defenses (A. 3048) was denied by the trial court on April 2, 1965 (A. 3062) and a judgment was thereafter entered as to Canada on April 5, 1965 (A. 3078-80).

By ordering a "*nunc pro tunc*" filing, the trial court insured that the defenses would be pleaded as of a date before

the judgment was entered, thereby bringing the facts within the holding of *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714, 717-18 (7th Cir. 1956) (which had been brought to the trial court's attention, AA. 240-41). In that case, the court pointed out that a waiver of an affirmative defense may be relieved if the defense is asserted "before judgment."

In fact, Zenith has previously admitted that the trial court granted leave to file the pleas, and then passed upon them on the merits. At page 16 of its reply brief in the original appeal to this Court (No. 49, October Term, 1968), Zenith said:

> "*The trial court permitted the filing of the pleas* as of a date a year after the trial (A. 3037), and *then promptly overruled the motion to dismiss* the counterclaim on these grounds (A. 3037)."

The defenses of release and limitations were not pleaded with HRI's answer to the counterclaim because they were not relevant to the cause of action pleaded by Zenith, which was represented by Zenith to claim damages only for matters which "occurred *after* the filing of the answer herein [April 7, 1960]" (A. 63). These defenses became applicable only after trial and findings which revealed that, contrary to the representations made in connection with obtaining leave to file the counterclaim (pp. 3-4, 42-44, *supra*), Zenith was actually claiming damages caused by acts occurring before the release and before the start of the limitations period (*e.g.*, Finding XXIX, A. 2905).

As a purported basis for its contention that the trial court held the defenses had been waived, Zenith refers to the trial court's *question* to HRI's counsel during oral argument, "You do agree that the statute of limitations can be waived. You agree to that, don't you?" (AA. 237), as though the trial court's mere question constituted a rul-

ing (Z. Br. 41). The transcript shows (AA. 240-41), however, that in specifically answering the court's question, HRI's counsel cited *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714 (7th Cir. 1956), and pointed out that the *Emich* case held that the trial court may *relieve a party* from failure to make a timely pleading of an affirmative defense and that a party may, at the discretion of the trial court, be granted leave to plead the defense at any time before judgment.

Indeed, the fact that the trial judge granted HRI's motion for leave to file the defenses *after* he raised this question and heard HRI's response shows that the court did not hold that the defenses were irrevocably waived. If, as Zenith contends, the trial court held that the defenses were irrevocably waived, that court would have *denied* leave to file them when Zenith objected that the defenses were "too late" (AA. 251). See *Groninger* v. *Davison*, 364 F.2d 638, 639-40 (8th Cir. 1966) where the court, in rejecting an argument that a limitations defense had been waived, relied upon the fact that "leave to amend the answer [to assert such a defense] was expressly granted by the order of the District Court. . . ."

At page 44 of its brief Zenith asserts that the "district court permitted HRI leave to file the defenses . . . for 'the sake of the record' (AA. 164, 251)." This repeats an argument made by Zenith in its reply brief in support of its Petition for Certiorari where Zenith asserted that in granting HRI's motion "the District Court . . . was only permitting the defenses to be filed so that HRI could protect its record on appeal" (Z. Cert. Rep. Br. 2). This argument ignores the fact that the issues of release and limitations *already* appeared "on the record," having been previously presented in HRI's written motion (A. 2939-51), which specifically raised these issues and asked permission to plead them as affirmative defenses (A. 2951).

Moreover, contrary to the inference which might be drawn from Zenith's brief (Z. Br. 44), the trial judge did not say that he was granting leave to file the defenses "for the sake of record." That phrase was used by HRI's counsel in reasserting as oral motions the written motions previously filed. HRI's counsel there indicated that he was *making the motion* "for the sake of the record," not that he was asking that the defenses be filed "for the sake of the record" (AA. 250). The oral motion expressly stated that leave was sought to file these "affirmative defenses as a *formal pleading* of release and statute of limitations" (AA. 250), and the trial court clearly recognized that HRI was asking leave to file them as "new pleadings" (AA. 250). Thus, Zenith's assertion that the grant of leave to file the defenses was *not* a grant of leave but merely a means of putting the affirmative defenses on the record is specious on its face.

Zenith also argues that the trial court rejected the "only ground urged" by HRI in support of its motion to withdraw the findings and reopen the proofs as to Canada and that the denial of that motion was necessarily a holding that the defenses were waived (Z. Br. 44-45). Zenith ignores the fact that HRI raised a number of grounds in support of its motion, including the fact that as a matter of equity and justice HRI should have an opportunity to plead the affirmative defenses, and to assert the governmental embargoes in England and Australia (A. 2949-50; AA. 247-49). That the trial court recognized that considerations of equity and justice applied is shown by the fact that it permitted HRI to assert the English and Australian governmental embargoes as a defense to the damage claims in those countries after "proofs [had been] closed" and "findings [had] been made," and permitted hearings after which it reduced the damages awarded as to England and Australia by cutting them approximately in half (A. 3037-38, 3202-06, 3524-26, 3534-35, 3537).

Indeed, everything that Zenith has argued here as indicating that the trial court held that the statute of limitations and release defenses had been waived (Z. Br. 41-45) was equally applicable to the embargo defenses. The trial court granted leave to HRI to prove the existence and effect of the embargoes and to plead the defenses of release and limitations—all after the proofs had been closed and the findings had been made (A. 3037-38). However, unlike its conclusion with regard to the embargoes, the trial court erroneously concluded that the defenses of statute of limitations and release could not bar any part of the recovery.

2. The Trial Court Had the Power to Relieve Any Late Filing of the Affirmative Defenses by Granting Leave to Plead Them Before Entry of Judgment.

Zenith's argument that affirmative defenses neither pleaded under Fed. R. Civ. P. 8(c), nor asserted by a motion under Fed. R. Civ. P. 12(b) are waived and that the waiver "is *final*" if not corrected "either prior to trial or during trial . . ." (Z. Br. 42) is also without merit. The effect of Zenith's argument is that a trial court is without power to permit the plea of an affirmative defense at any time after the trial even though judgment has not yet been entered. This argument ignores completely the fact that a waiver of defenses under Fed. R. Civ. P. 12(h) and 8(c) is "not final" and may be "relieved" and that Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714, 717-18 (7th Cir. 1956). Quoting from a decision of this Court, the court in *Emich Motors* stated that:

> "It is well settled that . . . a defendant who desires to avail himself of a statute of limitation as a defense must raise the question either in the pleading, or on the trial, *or before judgment*" (229 F.2d at 717).

See also *Alvado* v. *General Motors Corp.*, 194 F.Supp. 314,

316 (S.D.N.Y. 1961), *aff'd*, 303 F.2d 718 (2d Cir. 1962), *cert. denied*, 371 U.S. 925 (1962); *Groninger* v. *Davison*, 364 F.2d 638, 640 (8th Cir. 1966).[31]

The principal case Zenith cites (Z. Br. 42) for the proposition that the trial court could not relieve the late filing is *Systems Inc.* v. *Bridge Electronics Co.*, 335 F.2d 465, 466 (3d Cir. 1964). There the defense was raised for the first time on appeal. There was no issue whether the trial court could have granted leave to the defendant to plead the defense before judgment.

In *Wagner* v. *Fawcett Publications*, 307 F.2d 409, 412 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963) (cited Z. Br. 43), the district court on its own motion had dismissed the complaint on the grounds of the statute of limitations after one defendant had withdrawn the defense and the other never raised it, and the Court of Appeals held it error for the trial court to raise and apply the statute of limitations *sua sponte*.

The other cases cited by Zenith (Z. Br. 43) are similarly inapposite. For example, in *Roe* v. *Sears, Roebuck & Co.*, 132 F.2d 829, 832 (7th Cir. 1943), the Court said:

> "When defendant moved for summary judgment it had filed an answer, the legal effect of which was a waiver of its defense of the statute of limitations. It could not, therefore, *unless relieved from its default*, revive the defense it had waived. We need not consider when a defendant may be excused from its failure to plead the statute of limitations, and be permitted to amend its answer, because the instant case presents no such question. The defendant herein sought no such relief."

Both *Tornello* v. *Deligiannis Bros.*, 180 F.2d 553 (7th Cir. 1950) and *Oedekerk* v. *Muncie Gear Works*, 179 F.2d 821

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[31] And see Marconi Wireless Co. v. United States, 320 U.S. 1, 47-48 (1943) as to the broad powers of trial courts to reopen a case at any time before judgment.

(7th Cir. 1950), apparently involved attempts to raise affirmative defenses for the first time on appeal. The *Oedekerk* case was specifically distinguished on that ground in the *Emich Motors* case (see 229 F.2d at 717).

The amendment to pleadings has always been considered a matter within the discretion of the trial court. The decisions of the lower federal courts and this Court indicate that (1) the rule that "leave shall be freely given when justice so requires" is to be "heeded" and (2) the grant or denial of the opportunity to amend is a matter within the discretion of the trial court which in the absence of an abuse of discretion should not be disturbed. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).[32]

II. THE COURT OF APPEALS WAS CORRECT IN RULING ON THE DEFENSES AND IN REMANDING TO THE TRIAL COURT FOR FURTHER HEARINGS.

A. Since This Court Decided Only the Fact of Damage Issue, the Issues of Release, Limitations and Amount of Recoverable Damage Were Before the Court of Appeals.

The principal thrust of Zenith's Petition for Certiorari was that the Court of Appeals had "disregarded the mandate of this Court and in effect reversed the decision of this Court" (Z. Pet. Cert. 2). Zenith's contentions were that this Court's opinion should be construed as having decided the issues of release, limitations and amount of recoverable damages, and that a Court of Appeals does not have the power to pass upon undecided issues unless specifically directed by this Court so to do (*e.g.*, Z. Pet. Cert. 8-9).

Although Zenith's brief largely abandons these asser-

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[32] Indeed, we believe it would have been an abuse of discretion to have denied leave under the circumstances of this case.

tions, some vestiges still appear. For example, Zenith cites *In re Potts,* 166 U.S. 263 (1897), stating the recognized principle that the lower court has no authority to pass on matters once decided by this Court (Z. Br. 27-28), and implies that this Court has held that "the damage award" of $18,892,173 should be sustained (Z. Br. 24).[33] Also, while Zenith's brief does not repeat the argument made in its Petition for Certiorari (Z. Pet. Cert. 8-9) that a lower court has no authority to pass on specific issues unless this Court expressly instructs it to do so, a vestige of that argument remains in Zenith's statements that "[t]his Court's opinion will be searched in vain to find any remanding order express or implied, for further consideration by the court below of the issues of limitations and release" (Z. Br. 31).

Although these contentions of lack of jurisdiction and authority appear now to be substantially abandoned, we believe it appropriate to point out briefly that this Court passed only upon the *fact* of damage issue.

In reviewing the decision of the Court of Appeals, this Court pointed out that HRI had raised a number of "major points" in the Court of Appeals but that in view of that court's "overriding judgment" that Zenith had not been injured by pool conduct, the other "major points" were never reached (AA. 13, 17; 395 U.S. at 113, 118).

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[33] Zenith's Questions Presented (No. 5, Z. Br. 4) conveys the impression that this Court approved the damage award of $18,892,173. Zenith there incorrectly quotes this Court as saying "that 'the record evidence is sufficient to support *the* finding of damage resulting from events occurring after the beginning of the damage period.'" In fact, the Court *said* that "the record evidence is sufficient to support *a* finding of damage . . ." (AA. 19; 395 U.S. at 119), and was clearly referring to the fact of damage and not to the amount of the award.

These other points included the defenses of statute of limitations and of release and the issue of the *amount* of recoverable damages (AA. 13; 395 U.S. at 113).

This Court pointed out specifically and repeatedly that the Court of Appeals had ruled only on the fact of damage issue, "[w]ithout reaching any of the other issues presented by the appeal on this phase of the case . . ." (AA. 7-8, 13; 395 U.S. at 107-08, 113).

As to Canada, this Court held that the Court of Appeals had erred in its conclusion that the "fact of damage" during the four-year period had not been proved, stating that although Zenith's evidence was "by no means conclusive," it "was sufficient to sustain the inference that Zenith had in fact been injured to some extent . . ." (AA. 14; 395 U.S. at 114). The Court made it clear that its decision was limited to the fact of damage issue and that its ruling did not cover the extent of the injury, *i.e.*, the amount of damage. In explaining its statement that Zenith had been injured *"to some extent"* the Court said:

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* [emphasis by this Court] damage flowing from the unlawful conspiracy; *inquiry beyond this minimum point goes only to the amount* and not the fact of damage" (AA. 14 n. 9; 395 U.S. at 114 n. 9).

The Court pointed out that the Court of Appeals had decided that there was no injury during the damage period to Zenith "from pool activities either *before* or *after* the beginning of the damage period" (AA. 13; 395 U.S. at 113). In reversing that decision, this Court concluded that the evidence warranted "the inference that CRPL's *past conduct* interfered with and made more difficult the distribution of Zenith products in 1959 and later years" (AA. 18; 395 U.S. at 118); and that "the record evidence is sufficient

to support a finding of damage resulting from events occurring *after* the beginning of the damage period" (AA. 19; 395 U.S. at 119).

The effect of these conclusions was that the trial court's finding of the fact of some damage was sustained, and that even if Zenith's right to a recovery for damages based on pre-damage period conduct was barred by limitations or by the September 27, 1957 releases, nevertheless Zenith could assert a claim to recovery to the extent that the damages suffered were due to damage period conduct. Thus it was not necessary for this Court to rule upon the applicability or effect of the defenses of limitations or release. On the other hand, it was appropriate for this Court to consider pre-damage period conduct on the fact of damage issue, because pre-damage period conduct could form the basis for additional recovery if the Court of Appeals should decide that the affirmative defenses had been waived or did not bar recovery based on pre-damage period conduct.

Since this Court decided only the "fact of damage" issue and remanded "for further proceedings consistent with this opinion" (AA. 40; 395 U.S. at 141), there can be no doubt that the Court of Appeals had the authority to consider and decide all remaining undecided issues. It has been the law, at least since *Ex parte French*, 91 U.S. 423 (1875), that when a case is reviewed by this Court or any other appellate court on a single issue and then remanded for further proceedings, the lower court has jurisdiction, indeed has the duty, to decide the remaining issues, and that an instruction to the court below to "proceed in conformity with the opinion" of the Court is all the instruction customary or required to authorize and direct the court below to pass upon the issues left open by this Court's decision (91 U.S.

at 426). See also *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895).[34]

The Court of Appeals' decision in no way attempts to question this Court's conclusion that the Court of Appeals had "*erred* in setting aside the District Court's decision with *respect to the fact of damage in Canada*" (AA. 14; 395 U.S. at 114). Instead, the Court of Appeals specifically recognized at the outset of its opinion that "[t]he Supreme Court reversed our decision with respect to the Canadian patent pool because *it concluded we erred* in our determination that Zenith had failed to prove *the 'fact' of damage in Canada*" (AA. 55). It then proceeded to a consideration of the remaining undecided issues, pointing out that:

> "These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith" (AA. 55).

The issues considered by the Court of Appeals are those which this Court referred to in its opinion but did not de-

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[34] The cases since the *French* and *Sanford* cases have consistently held that the procedure employed by the Court of Appeals in this case is proper. See Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939) (the lower court is free to decide remaining issues on remand); General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 284-85 (1922) (reversal by an appellate court on single issue does not preclude consideration of other issues in lower court); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 704 (1967), and following remand, Continental Baking Co. v. Utah Pie Co., 396 F.2d 161, 163, 195-96 (10th Cir. 1968), *cert. denied*, 393 U.S. 860 (1968) (after reversal by this Court on a single issue and remand "for further proceedings," the Court of Appeals decided the remaining issues and remanded for a new trial; Utah Pie petitioned for a writ of certiorari, contending that the action of the Tenth Circuit was in conflict with this Court's decision on the single issue, and this Court denied certiorari).

cide (pp. 8-9, *supra*), *i.e.* (a) the applicability of the affirmative defenses; (b) effect of the releases; (c) effect of the statute of limitations; and (d) the amount of recoverable damages in light of those defenses. Thus, the Court of Appeals clearly had the authority to decide these issues after remand by this Court.

B. The Court of Appeals Had Authority to Order a Remand for Further Proceedings in the Trial Court.

Zenith argues that the further hearings ordered by the Court of Appeals are a "complete new trial on the Canadian damage issue" (Z. Br. 27) and that the Court of Appeals had no authority to order such hearings in the absence of a showing of an abuse of discretion by the trial court by a refusal to grant a new trial (Z. Br. 15, 26-27). In so arguing, Zenith incorrectly states the record and ignores the nature of the rulings made by the trial court and the Court of Appeals.

To begin with, HRI's motion to the trial court was not for a "new trial" but for a reopening of the proofs to permit further hearings and the taking of additional evidence before entry of judgment, the motion being based in part on the defenses of release and statute of limitations (A. 2939, 2951). The trial court was not exercising its discretion when it denied HRI's motion as to Canada; rather, it was ruling (erroneously) as a matter of law that the dedefenses of release and limitations could not bar any of the recovery (see pp. 22-42, *supra*).

Similarly, the decision of the Court of Appeals was not that, as a matter of discretion, the trial court should have granted a new trial. On the contrary, the Court of Appeals held that the trial court had committed errors of law (namely, the failure to give the proper effect to the statute of limitations and the release defenses) and that to correct those errors of law, the taking of additional evidence on

the issue of the amount of recoverable damages is necessary (AA. 56, 60-61).

Moreover, even if it could be said that the Court of Appeals had ordered a "new trial", there is no doubt that the Court of Appeals had the authority to do so upon its conclusion that legal errors had been committed by the trial court. This Court pointed out in *Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317, 327-28 (1967), that "the courts of appeals regularly and characteristically must deal" with "issues of law" which "may entitle [a party] to a new trial;" and that these issues of law "are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court." See also, *Ex parte French*, 91 U.S. 423, 426 (1875), in which this Court approved the action of the appellate court in providing for a new trial which was necessitated by a previous erroneous legal ruling, even though this Court had not ordered a new trial but merely directed proceedings "in conformity with this opinion."

In any event, the Court of Appeals has not ordered a new trial but rather has called for a determination *for the first time* of the amount of damages suffered by Zenith as the result of damage period conduct, a question *never previously considered* by the trial court, and as to which there are no findings. Since the amount of damages could not be determined on the basis of the present record (p. 11, *supra*), it was necessary for the matter to be remanded to the trial court for the taking of additional evidence to give effect to the defenses of release and limitations, and to determine the proper amount of the damage award.

Certainly, the remand order here was within the Court of Appeals' statutory authority to remand the cause and "require further proceedings to be had as may be just under the circumstances" (28 U.S.C. § 2106).

III. ZENITH'S ARGUMENT THAT THE DECISION OF THE COURT BELOW WAS CONTRARY TO *BIGELOW v. RKO RADIO PICTURES* IS WITHOUT ANY BASIS.

Zenith devotes a major portion of its brief to various arguments to the effect that the Court of Appeals' decision was in conflict with this Court's opinion in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

In the *Bigelow* case this Court stated certain rules of law, relative to proof of the amount of damages, having to do with the use of *estimates* where more precise proof is not available. Thus, this Court stated that the defendant may not object in case the plaintiff makes a "*reasonable estimate* of the cause of injury and of its amount, supported by the evidence" (327 U.S. at 265); that the defendant should not be heard to object because plaintiff's estimate is not based on "more accurate data which the wrongdoer's misconduct has rendered unavailable" (327 U.S. at 265); and also that while the trier of the facts may not render a decision based on speculation or guesswork, he may "make a just and reasonable estimate of the damage based on relevant data" (327 U.S. at 264). Of course, there is nothing in *Bigelow* on the statute of limitations or on the law of release.

Zenith lays down a barrage of charges asserting that the Court of Appeals "gave no deference . . . to the *Bigelow* case as a precedent" (Z. Br. 15); "reverses *Bigelow*" (Z. Br. 21); did not pay "any attention" to *Bigelow* (Z. Br. 22); and gave "no deference" to the trial court's findings (Z. Br. 29). It even goes to the extreme of asserting that the Court of Appeals' opinion "not only reverses *Bigelow* but would make proof of lost profits in the case of exclusion from a market utterly impossible" (Z. Br. 21) and "makes the recovery of treble damages under the anti-trust laws *impossible in the Seventh Circuit*" (Z. Br. 30).

The truth is that the Court of Appeals in no way questioned the use of estimates and in no way failed to follow the requirements of proof as laid down in *Bigelow* and the other decisions of this Court. The only thing the Court of Appeals decided was that, because of the statute of limitations and the releases, Zenith was not entitled to recover damages flowing from pre-release and pre-damage period conduct.

Contrary to Zenith's repeated assertions (*e.g.*, Z. Br. 15, 22, 28-29), the Court of Appeals did not rule that Zenith's damage proofs were "insufficient as a matter of law" and did not reverse any findings of fact of the trial court. In fact, the Court of Appeals expressly recognized that Zenith's evidence was competent evidence *prima facie* of the type which could serve as a basis for a damage approximation under the *Bigelow* case (AA. 59-60). But the trial court award could not be reinstated—not because it was improper to use estimates to prove the amount of damages in an antitrust case—but because, as this Court had previously pointed out (AA. 16; 395 U.S. at 116-17), the estimates of Zenith's witnesses (and the trial court's findings) *necessarily* included the damages caused by pre-damage period conduct. Thus, rather than reversing the trial court's finding, the Court of Appeals' decision would call for additional findings—as to the damages resulting solely from damage period conduct.

Zenith purports to find great significance in its repeated assertion that there was no "countervailing evidence" or objection to the estimates of Zenith's witnesses (Z. Br. 10, 14, 25, 26). Of course, the simple, dispositive answer to this assertion is that for the purposes of the issue before this Court and the issue decided by the Court of Appeals, even if there was no "countervailing evidence" (which there was),[35] the lack of such evidence would be immaterial. The

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[35] See pp. 127-134 of HRI's main brief in the Court of Appeals, dated December 21, 1966 and on file with the Clerk of this Court as part of the record on appeal.

point is that Zenith's damage evidence did not even purport to answer the proper question, that is, the loss of market and the resulting loss of profits *caused by the conduct of the Canadian pool during the damage period.* Rather, it *estimated the wrong thing,* namely, what Zenith's market share and profit would have been if Zenith had entered the four-year damage period with a mature market position (pp. 4-5, 18-22, *supra*).

Zenith's brief says the Court of Appeals would "place the burdens of uncertainty" on Zenith (Z. Br. 25), and implies that on the record the entire damage award might possibly be "attributable" solely to damage period conduct (Z. Br. 23-24, 30). *On the contrary, Zenith's own evidence and estimates establish affirmatively that a very substantial portion of the award is "necessarily" based on pre-damage period conduct and cannot be attributed to conduct during the damage period* (AA. 16; 395 U.S. 116-17; pp. 4-5, 18-22, *supra*).

The extent of Zenith's reliance on pre-damage period conduct is emphasized by the fact that Zenith's evidence and estimates assumed a mature market, several times greater than Zenith actually had (the estimates assumed a starting share of around 16% of the television market and 13% of the radio market rather than Zenith's actual starting shares of about 3% and 4%, respectively). The obvious way to segregate and determine the damages which are recoverable, *i.e.*, damages caused by damage-period conduct, is to determine what Zenith's market share should have been, absent the operation of the pool during the damage period, and starting with the share of the Canadian market which Zenith actually had at the beginning of the period.

In arguing that *Bigelow* requires that it be awarded the original Canadian judgment of $18,892,173 regardless of the fact that a substantial portion of the award is based on pre-damage period and pre-release conduct, Zenith is in

substance asserting that *Bigelow nullifies* the statute of limitations and the law of settlement and release. However, nothing in *Bigelow* or any of the other cases cited by Zenith suggests that this Court meant to abrogate the statute of limitations imposed by Congress, or to abrogate the settled law of release, and Zenith's brief cites no authority or reason that would support such a result.

Similarly without basis are Zenith's repeated assertions that the decision of the Court of Appeals limits Zenith's damages to those flowing from the June 5, 1959 letter from the Canadian pool (Z. Br. 4, 29) and that the Court of Appeals held that Zenith's damages "must be computed as allocated to particular overt acts" (Z. Br. 14, 20, 28). The Court of Appeals made no such rulings. It did refer to the June 5, 1959 letter as an illustration of damage-causing conduct, but made it clear on the face of its opinion that Zenith was entitled to recover all damages flowing from damage-causing conduct taking place within the period (AA. 58-61). Contrary to Zenith's assertion (Z. Br. 29), there is nothing in the Court of Appeals' opinion that is inconsistent with the recovery by Zenith of damages resulting from the Canadian pool's continued operations during the damage period. In fact, under the opinion of the Court of Appeals Zenith is clearly entitled to recover the difference between the profits it actually made and those it would have made if, during the damage period, it had been a free competitor (AA. 59).

Determining the amount of damages in this manner neither "destroys" Zenith's right to recover treble damages, as argued by Zenith (Z. Br. 26) nor makes the proof of lost profits "utterly impossible," as Zenith contends (Z. Br. 21). What the Court of Appeals' decision would require is a determination of the market share and the profits which Zenith would have achieved in the period from May 22, 1959 to May 22, 1963, starting with the share of the

Canadian market Zenith actually had at the beginning of the damage period and assuming that the pool was out of existence or not exercising any effect upon Zenith's operations during the damage period. Zenith cannot validly assert that estimating damages in this manner is impossible. This is exactly the procedure which Zenith's witnesses purported to have used in estimating damages for England and Australia. There, faced with the proof of the government embargoes barring Zenith's entry into these countries prior to the damage period, Zenith's witnesses claimed that their estimates as to what Zenith's market share would have been in England and Australia were made on the assumption that Zenith would have been starting as a new entry in the market (A. 3438-39, 3490). While these estimates were found by the trial court to involve exaggeration (A. 3525), Zenith's witnesses had no hesitancy to make such estimates.

Finally, far from placing the burden of uncertainty on Zenith (see Z. Br. 25), the Court of Appeals has held that on remand it is HRI who is to offer evidence "aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts" and "to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391" (AA. 61). Zenith, of course, will be entitled to offer evidence on its behalf.

IV. THERE IS NO MERIT IN ZENITH'S INSINUATIONS OF PREJUDICE OR ITS ASSERTIONS THAT THE "PUBLIC INTEREST" REQUIRES THAT THE ENTIRE ORIGINAL AWARD OF $18,892,173 BE REINSTATED.

A. Zenith's Insinuation that It Has Been Denied Justice By a Prejudiced Court of Appeals Is Unwarranted.

Zenith's current brief omits the outrageous innuendo of its Petition for Mandamus (Z. Pet. Mand. 24) that "it is apparent from its two opinions that the court below is

going to find successive reasons for denying Zenith the treble damage recovery in this case." But it continues Zenith's basic pose as an embattled litigant being denied justice by a prejudiced Court of Appeals. For example, Zenith asserts that the Court of Appeals "limit[ed] the issues to be tried [on further hearings] in a manner that *destroys* petitioner's right to recover treble damages for its loss of profits in Canada during the damage period" (Z. Br. 26) and even goes so far as to assert that the decision of the court below "makes the recovery of treble damages under the antitrust laws impossible in the Seventh Circuit" (Z. Br. 30). Such assertions are totally unwarranted, for the Court of Appeals specifically held that Zenith could and should recover damages in this case.

Zenith again refers to its motion in the Court of Appeals to disqualify Judge Cummings and, without directly so stating, insinuates that the denial of this motion by the Court of Appeals and Judge Cummings' continued participation in this case was prejudicial (Z. Br. 11-12). It seems fair to question Zenith's motives in raising this matter at all, since it does not argue that this Court should reverse the denial of Zenith's motion or assert that the denial of the motion presents any question for review. In any event, the grounds cited by Zenith in its motion to disqualify Judge Cummings had no merit whatsoever and the motion was properly denied.

The alleged facts presented by Zenith's motion to disqualify Judge Cummings (AA. 48-51) relate to the counterclaim filed by Zenith and its subsidiary against RCA, Western Electric and General Electric more than 20 years ago (A. 2701-50) and terminated by settlement without trial over 12 years ago (A. 2751). Judge Cummings, then a practicing attorney in Chicago, was one of Western Electric's Chicago counsel in that litigation, and Zenith claims that Western Electric was a member of the Canadian patent pool (Z. Br. 11). Neither HRI nor Hazeltine Corpo-

ration was a party to that suit and Western Electric Company is not and never has been a party to this suit. None of the reasons for disqualification provided in 28 U.S.C. § 455 exists.

Moreover, the record shows that Zenith did not even claim to regard Judge Cummings as disqualified to sit in this case until one and one-half years after the first decision by the Court of Appeals, in which he participated without objection by Zenith. All the alleged facts relied on by Zenith in its motion were known to Zenith at the time this case was first argued orally in the Court of Appeals on May 18, 1967 before a panel composed of Judge Cummings and Judges Castle and Kiley. Yet at no time during the proceedings in the Court of Appeals following that argument or in its petition for rehearing following the decision by the Court of Appeals did Zenith challenge the qualifications of Judge Cummings to sit in this case. Nor did Zenith raise any question as to the qualifications of Judge Cummings in its Petition for Certiorari to this Court filed in March, 1968 or in any of its briefs to this Court in the previous appeal.

Furthermore, Zenith itself affirmatively requested Judge Cummings to continue to participate in the case when, on January 3, 1968, following the first decision of the Court of Appeals, Zenith filed "a petition for rehearing" requesting that "the case may be reheard by the entire Court *en banc*" (A. 4265, A. 10). There was no suggestion in that petition that Judge Cummings should disqualify himself or that he should not sit as one of the judges on the requested rehearing. On the contrary, Zenith specifically requested that the "entire Court" (which included Judge Cummings) should participate.

Zenith did not then regard Judge Cummings as disqualified and its motion seeking to disqualify him made after this Court's remand and over one and one-half years

after the initial decision of the Court of Appeals was clearly an afterthought.

In *Delaney* v. *United States*, 263 U.S. 586, 589 (1924), where a motion to disqualify a judge was not filed until after the matter had been decided against the moving party, the Court stated:

> ". . . yet it would seem that he [the movant] should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him. His action certainly suggests the idea that it was an afterthought with him . . ."

In the instant case, not only did Zenith "assume the competency" of Judge Cummings to sit, but by its petition for rehearing *en banc* it *affirmatively* recognized that competency.

B. No "Public Interest" Requires that Zenith Be Awarded Any Damages to Which It Is Not Lawfully Entitled.

Zenith asserts that "the deterrent effect of an enforced treble damage judgment is necessary to serve 'the high purpose of the antitrust laws,'" (Z. Br. 20).[36] Since the Court of Appeals has recognized that Zenith has a right to

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[36] The utter sophistry of Zenith's contention that the entire $18,892,173 originally awarded by the trial court should be reinstated because third parties are "not subject to the injunction" (Z. Br. 20) is exposed by the fact that in the previous appeal Zenith argued that it was the *injunction* which it had to have to protect its business in Canada. In fact, it represented to this Court that as a result of the injunction (which continues in effect today) Zenith and other American companies had been able to export $14,538,417 worth of television and radio sets to Canada in 1967 (Zenith Brief in No. 49, Oct. Term, 1968, p. 100; see also Zenith Reply Brief in No. 49, Oct. Term, 1968, pp. 43-44). Now, however, Zenith implies that the injunction has no real significance.

recovery for damages resulting from damage period conduct (AA. 59-61), Zenith's argument comes down to a contention that, as a matter of public policy or public concern, it should be awarded the entire amount it originally claimed irrespective of the validity of the defenses interposed by HRI.

Zenith's contention (Z. Br. 20) that an "enforced treble damage judgment" will have a "deterrent effect" of course ignores the fact that the Court of Appeals expressly recognized that Zenith is entitled to a treble damage judgment in this case in an amount equal to three times the damages suffered by Zenith attributable to damage period conduct (AA. 59-61). What Zenith is asking this Court to bestow on it is an *additional grant* of all of those asserted damages allowed by the trial court judgment which were based upon pre-damage period and pre-release conduct of the Canadian pool, and which are therefore barred by limitations and release and not lawfully recoverable (pp. 22-42, *supra*).

It is also contended that the granting of these additional sums to Zenith "is *necessary*" to further the deterrent effect of the antitrust laws and will "redound to the benefit of other American companies" (Z. Br. 20). Thus, Zenith would have the Court ignore the defenses of limitations and release and award Zenith the additional damages barred by those defenses, under the guise that a huge award to Zenith will serve as a deterrent effect and benefit others. If this same illogic had been applied to Zenith's claims for damages as to England and Australia in this case it would have resulted in a reinstatement of the original awards as to those countries notwithstanding the fact that, as the Court of Appeals found and this Court agreed, the record did not show that Zenith had suffered *any* damages as to those countries (p. 7 n. 4, *supra*). Indeed, all of Zenith's "public policy" contentions alleged to support its claim for

almost $19 million in treble damages with respect to the conduct of the Canadian patent pool should be considered in light of Zenith's similar arguments[37] that such a policy required that it be awarded almost $16 million (reduced from $30 million) with respect to its other claims in this case that have now been rejected both by this Court and by the Court of Appeals.

Zenith originally persuaded the trial court to enter findings in January, 1965 (drafted by Zenith) which, after trebling, would call for a damage judgment of almost $49 million (Findings XXXVI, A. 2908). About $30 million of these damages was based upon alleged interference with Zenith's export business to England and Australia and almost $19 million as to Canada. Following only limited further hearings in late 1965 concerning the alleged damages to Zenith's export business to England and Australia, the trial judge recognized that he had been misled and reduced his award as to those countries by nearly $14 million, down to approximately $16 million (Amended Findings XXXVI, A. 3537, 3539; see also A. 3525-26). On appeal the Court of Appeals held that Zenith in fact had suffered *no damage* in those countries (A. 4256-57) and this Court affirmed (AA. 14, 25-29; 395 U.S. at 114, 125-29). If HRI had been denied the opportunity to pursue its remedies, Zenith would have been awarded almost $30 million based on alleged "damages" which Zenith *said* it had suffered, but which in fact it had not.

In addition, after Zenith got the trial court to enter the findings calling for treble damages of almost $49 million, it was apparent to Zenith that HRI could pay only a small portion of this amount, its net book value at the end of 1964 being only about $3,184,419 (A. 3007). Accordingly,

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[37] See page 35 of Zenith's Reply Brief in No. 49, October Term, 1968.

Zenith for the first time asserted that the parent Hazeltine Corporation should be bound by the judgments and the trial court entered the judgments requested by Zenith. However, the Court of Appeals held that the judgments against Hazeltine Corporation were void for want of jurisdiction (A. 4240-44) and this Court affirmed (AA. 10; 395 U.S. at 110).

Arguments that the "public interest" justifies a multimillion dollar treble damage award to a private claimant ring particularly hollow when that claimant is someone who has already demonstrated an eagerness to receive millions of dollars in "treble damages" without legal right, as Zenith did in its claims as to England and Australia. Moreover, Zenith is not some small company fighting for its life, but a giant in its industry, again asking to be awarded a sum not only legally unjustifiable, but which would be totally destructive to HRI, since $18,892,173 is far in excess of its net worth.

We recognize that this Court and the lower federal courts, including the Seventh Circuit, have repeatedly held that the policy of the antitrust laws is furthered by permitting liberality as to the proof of the amount of damages suffered by an antitrust plaintiff. However, there is no public policy which requires that the statute of limitations or the law as to the settlement and release of claims should be ignored in antitrust cases. On the contrary, the Congress has adopted a statute of limitations specifically applicable to antitrust treble damage cases (15 U.S.C. § 15(b)), and the courts have held (pp. 28-31, *supra*) and Zenith has admitted (p. 28, *supra*) that the law of release applies to antitrust treble damage cases.

The Court of Appeals has recognized Zenith's right to recover damages resulting from damage period conduct and

has provided for a remand so that the amount of such damages may be determined. Nothing in its opinion in any way deprives Zenith of the rights and protections afforded treble damage plaintiffs under the *Bigelow* case and other applicable law. The public interest would not be served by acceding to Zenith's demands that the law be ignored so that Zenith may receive great sums of money to which it is not lawfully entitled.

CONCLUSION

We respectfully submit that the ends of justice require that the judgment of the Court of Appeals be affirmed so that the case may go back to the trial court for a determination of the amount which HRI owes to Zenith.

Respectfully submitted,

JOHN T. CHADWELL
VICTOR P. KAYSER
C. LEE COOK, JR.
JOSEPH V. GIFFIN
ROBERT F. WARD
135 South La Salle Street
Chicago, Illinois

LAURENCE B. DODDS
160 Middle Neck Road
Great Neck, New York

Attorneys for
Hazeltine Research, Inc.,
Respondent

Of Counsel:

CHADWELL, KECK, KAYSER & RUGGLES
135 South La Salle Street
Chicago, Illinois 60603
RAndolph 6-2545

Dated June 1, 1970